82-1087

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE INTERNATIONAL BROTHERHOOD OF BOILER-MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

PETITIONER,

v.

WILLIAM WATTLETON, et al.,

and

STEVE T. TILLMAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seniority system in question was bonafide within the meaning of Section 703(h) of Title VII because it was not negotiated and maintained for the purpose and with the intent and effect of discriminating against Blacks.
2. Whether responsibility for damages caused by employment discrimination should be apportioned between the employer and union according to actual liability, where the employer had entered into a consent decree before trial which settled all financial obligations to the plaintiffs.
3. Whether a fair trial on liability under Title VII can be conducted where the major defendant has settled any potential obligations to the plaintiffs prior to trial.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509, Defendant-Appellant in Court of Appeals for the Seventh Circuit.

WILLIAM WATTLETON, JOHNIE ROBINSON, CLAYTON JACOBS, JOHN ARMSTRONG, ABRAHAM LEFLORE, WARDELL WILSON, CLARENCE SUGGS, DANIEL BROWN, RUGEN MADISON, ROBERT SPEARMAN, FRED J. COLIN, individually and on behalf of others similarly situated. Plaintiffs Appellees, in the Court of Appeals for the Seventh Circuit.

STEVE T. TILLMAN, WILLIAM BELL, CHARLES JONES, CHARLES C. GRAVES, TOMMIE L. BALLET, HENRY E. GRAVES, WILLIE QUEARY, Plaintiffs-Intervenor-Appellees, in the Court of Appeals for the Seventh Circuit.

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Alvin R. Ugent, of the law firm of Podell, Ugent & Cross, S.C. on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #1509, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1) is reported as Wattleton v. International Brotherhood of Boilermakers, 686 F.2d 586 (7th Cir. 1982). The opinion of the District Court (App. G, infra, A - 63) is reported as Wattleton v. Ladish Co., 520 F. Supp. 1329 (E.D. Wis. 1981). The memorandum decision of the District Court (App. D, infra, A - 25) approving the consent decree is published as Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1982. A petition for a rehearing was denied September 27, 1982. The time within which to file a petition for a writ of certiorari is December 27, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title VII, Civil Rights Act of 1964, Section 703(a), also known as 42 U.S.C. Section 2000e-2, which reads as follows:

"(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin, or,

(2) to limit, segregate or classify his employees in any

way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin."

2. Title VII, Civil Rights Act of 1964, Section 703(h), also known as 42 U.S. C. Section 2000e-2(h), which reads as follows:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religión, sex or national origin. It shall not be unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of

wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Sec. 206(d) of Title 29." (Emphasis added.)

3. Title VII, Civil Rights Act of 1964, Section 703(j), 2 U.S.C. 2000e-2(j), which reads as follows:

"Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national

origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

4. 42 U.S.C. Section 1981, Civil Rights Act of 1870, which reads as follows:

"Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT

1. The Ladish Company, hereinafter called "Ladish" or "Company" was started as a forge shop in 1927. It steadily grew and presently makes forgings for space vehicles and jet aircrafts, some forging ranging from forty pounds in weight to three hundred thousand pounds, about fifty percent of its business being with the Government. It does not made a unique product per se, but rather takes special orders for specific and differing forgings, and thus by the very nature of its unique products is a manufacturing plant where "job bidding" and seniority are particularly important to a steady job for its multi-union employees. The Company has always been in exclusive charge of the hiring.

2. The first Union to represent Ladish employees was the International Die Sinkers Conference in April, 1943.

3. The next Union to represent Ladish employees was the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 1509, hereinafter called "Blacksmiths" or "Local 1509" who are the petitioners herein.

The Blacksmiths, through various departments in its bargaining unit, receive raw materials and warehouse it in the steel stores department, cut it and send it to the forge shop department for forging. The Blacksmiths represent about 1,000 of the 4,000 Ladish employees, and were organized and certified by the National Labor Relations Board in March of 1945. At the present time only 450 Blacksmiths are working due to an economic slowdown.

4. The industrial environment in the Forge Shop was very adverse from the standpoint of heat, air quality and

working environment with sludge an inch deep on the floor, and scale burns frequent, and hammers dropping six stories.

5. If an employee who is a member of the Machinists' union wants to become a member or obtain a job in, for example, the Blacksmiths' union, he would register his intention to transfer into the Blacksmiths' union with the Company's employment department. If, at a future date, the Company were increasing the work force in the Blacksmiths' union, it would go to the transfer-request listing and, in order of plant-wide seniority, give appropriate consideration to that request before proceeding to hire applicants from outside its current employment level.

That employee from the Machinists would have concurrent seniority within the Machinists and Blacksmiths for up to a period of the first 60-days in the

Blacksmiths' unit. Within that 60-day period, the employee could elect to opt out of the Blacksmiths back into the Machinists. Electing to remain within the Blacksmiths' unit, that employee's bargaining unit seniority and departmental seniority would commence as of the first date of entrance into the Blacksmiths.

He would utilize his bargaining unit seniority within the Blacksmiths' unit for job bidding . . . that same date of transfer bargaining seniority would be utilized for lay-off . . . and recall purposes.

6. August 16, 1948 the first black employee was hired by Ladish. Two blacks were hired by Ladish Company in 1948, three in 1950, twenty-four in 1951, twelve in 1952 and fifteen in 1953. Two American Indians were hired by Ladish into the Blacksmiths' union in 1948 and four with Spanish surnames were

hired by the Company in that same year into the Blacksmiths' Union. No blacks were hired by the Company into the Blacksmiths' bargaining unit from 1948 to 1967. However, for a period of ten years, during that time from 1948 to 1957, no one was hired by the Company into the forge shop department of the Blacksmiths.

At one time during the course of their bargaining history the Machinists have allowed any employee from Blacksmiths' bargaining unit to transfer into their unit with full seniority. But as to such "carry-over" seniority, that is seniority which would apply to transfers from one bargaining unit at Ladish into another without loss of "bargaining unit" seniority, there was only one exception, and that for a limited period of time from 1952 to January 27, 1955 when the Blacksmiths' Union opened its doors,

so to speak. If a black machinist and a white machinist both wanted to transfer into the Blacksmiths' union, they go with the same loss of seniority. It is just the application of prohibition of "carry-over" seniority that applies to all, irrespective of race.

7. In 1973 and 1974, the Office of Federal Contract Compliance (OFCC) conducted an audit of Ladish's Cudahy facility which included an analysis of the company's then existing workforce. Based on its audit, its examination of documents and evidence furnished by Ladish, OFCC concluded that an affected class existed at Ladish, consisting of all Blacks who were hired by the company prior to January 22, 1968, and who were placed by Ladish in jobs under the jurisdiction of the Machinists.

8. Shortly after the OFCC reached the conclusion that Ladish had an affected

class of Black employees who had suffered employment discrimination, the first of 18 Blacks employed by Ladish filed a charge of employment discrimination with the Milwaukee office of the Equal Employment Opportunity Commission, naming as respondents the Ladish Company and the seven unions with which it had collective bargaining agreements. On December 29, 1975, a suit was filed by 11 Black employees of Ladish, on their behalf and on behalf of all others similarly situated. Later, seven other Black employees filed similar EEOC charges, received letters concerning their right to sue; and on May 3, 1977, filed a motion for leave to intervene as plaintiffs in the suit. This was allowed; and on February 12, 1980, the district court granted, in part plaintiffs' motion to certify the class,

9. On the same date, the court

granted a motion that severed the issue of liability from those of damages and remedies, in the event liability was established at trial. Then, at a conference held on November 3, 1980, plaintiffs, the Ladish Company, and four of the seven unions, informed the district judge that they were prepared to settle the case as to them.[1] They reported agreement to a proposed consent decree, and requested a hearing. Notices were issued to members of the class, a date was set for the court to hear objections, approve or disapprove the consent decree, and enter an appropriate order. The hearing, a lengthy one, was begun on December 22,

[1]The unions were (1) International Federation of Professional and Technical Engineers, Local #92 (IFPTE); (2) International Brotherhood of Firement and Oilers, Local #125 (IBFO); (3) International Brotherhood of Electrical Workers, Local #494 (IBEW); and (4) Associated Unions of America, Local #500 (AUA).

1980; and on February 13, 1981, the court reviewed the proposed consent decree and issued a Memorandum approving it. (Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981).

The effect of the settlement was to remove the Ladish Company and the four unions from the suit. This having been done, the remaining issues between plaintiffs, the remaining union locals: the Machinists,[2] the Die Sinkers,[3] and the Blacksmiths, were set for trial. They were heard to the court on plaintiffs' contention that (1) Ladish, with the full knowledge, cooperation and complicity of the three unions, maintained a policy and practice of hiring Blacks and assigning them to the dirtiest, lowest

[2]The International Association of Machinists and Aerospace Workers, District No. 10, Local #1862 (Machinists).

[3]International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 (Die Sinkers).

paying, and least desirable jobs within the jurisdiction of the Machinists; (2) Ladish, with the acquiescence of the three unions, maintained a policy of refusing to promote and transfer Blacks to better paying and more desirable jobs within their jurisdictions; (3) the three unions, by reason of seniority systems in their respective collective bargaining agreements, perpetuated the initial discrimination against Blacks because their seniority systems prevented them from transferring to better paying and more desirable jobs with full carryover seniority within the respective jurisdictions; and (4) that the Machinists' bargaining unit failed to properly and fairly represent its Black members.

10. After hearing evidence, the district court made findings of fact and

reached conclusions of law published in Wattleton v. Ladish Co., 520 F.Supp. 1329 (E.D. Wis. 1981). It found that during the period in question, all persons who were hired by Ladish and given jobs in the Machinists' and Die Sinkers' bargaining unit were accepted without regard to race or national origin, 520 F.Supp. at 1338; and that the Machinists did not fail to properly and fairly represent their Black members. 520 F.Supp. at 1347. But as to the Blacksmiths, the district court weighed the credibility of four Blacks who testified about their work experience at Ladish, reviewed the record, and found that no Black employee in the Cudahy plant transferred to a job under the jurisdiction of the Blacksmiths because its members, expressing its policy, made it clear to Ladish, and to the Blacks, that the local union would not accept

them into its bargaining unit, 520 F.Supp. at 1341; that the OFCC determinations, the testimony of Ladish's Black employees, and the operation of the challenged systems were persuasive evidence that the seniority provisions had perpetuated the effects of prior discriminatory practices and have carried their effects into the present, 520 F.Supp. at 1341; that the challenged seniority systems in the separate bargaining units were rational, in conformance with industry practice, and with the provisions of the National Relations Act, 520 F.Supp. at 1342; and that because they were originally negotiated at a time when Blacks were not employed at Ladish, the seniority systems of the three unions, including the Blacksmiths', did not have their genesis in racial discrimination. 520 F.Supp. at 1343.

11. Having made these findings, the court then turned to the question whether the challenged seniority systems, after their genesis, were thereafter negotiated and maintained free from any illegal purpose. 520 F.Supp. at 1343. It found that there being no evidence to the contrary, the Black plaintiffs had not established that the seniority systems which existed under the collective bargaining agreements between Ladish, the Machinists, and the Die Sinkers were maintained with a purpose and intent to discriminate against them. 520 F.Supp. at 1346. But tracing the history of the Ladish-Blacksmiths' collective bargaining agreements, as it had in those between Ladish and the other two unions, the district court found that while the Blacksmiths' seniority system under examination was essentially the same as the one contained in the original

agreement, the provisions had not been carried forward unchanged. In fact, there had been three changes, and all of them "coincided with the time Ladish first began to hire blacks in 1948 . . . or with times of a steady increase in the hiring of blacks at Ladish." 520 F.Supp. at 1345.

The first change was included in the agreement effective August 22, 1949 to September 30, 1951 and provided that plantwide seniority would carry over to jobs under the jurisdiction of the Blacksmiths for purposes of layoff. This difference benefitted only Caucasians who, without difficulty, transferred into the Blacksmiths' bargaining unit; no Black was successful in making such a transfer. The second was elimination, in the same collective bargaining agreement, of a nondiscrimination clause that was not again included in an agree-

ment between Ladish and the Blacksmiths until passage of Title VII in 1964. The third was inclusion in the August 22, 1949 agreement of a provision regarding interbargaining unit tranfers which stated that:

> "Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred."

The district court found that on August 22, 1949 "and thereafter, [this provision] gave the Blacksmiths virtual veto power over interbargaining unit transfers." 520 F.Supp. at 1345.

Based on the evidence that showed these three changes, the evidence relating to the feelings of individual blacksmiths toward transfers by Blacks to jobs in their unit, the evidence which showed that Caucasians transferred to jobs under the Blacksmiths with full carryover seniority

while at the same time Blacks were discouraged from doing so; and having drawn reasonable inferences therefrom, the district court found "that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths." . . . 520 S.Supp. at 1346; and, "that the seniority systems negotiated between Ladish and the Blacksmiths have and were intended to have a disparate impact on black workers at Ladish." 520 F.Supp. at 1347. Therefore, the court concluded that "the seniority system of the Blacksmiths is not bona fide within the meaning of 703(h) of Title VII."

12. The decision was appealed to the Seventh Circuit Court of Appeals. On August 16, 1982, the circuit court issued

its findings that

(1) The district court's findings of fact are not clearly erroneous; they are supported by substantial evidence on the record.

(2) The district court was correct in concluding that the Blacksmiths' seniority system is not bona fide within the meaning of Section 703(h) of Title VII.

REASONS FOR GRANTING THE PETITION

I. The Seniority System in Question Was Not Negotiated and Maintained for the Purpose and With the Intent and Effect of Discriminating Against Blacks.

At the conclusion of the trial in the district court, Judge John . Reynolds stated:

> "In practically all these civil rights cases to a certain extent it's kind of like a generation on trial, I won't say all of them but at least many of them I have been involved in, the current officials really weren't there making the decisions that this Court's decision is based upon. So really it isn't--you can say it's the generation on trial, but another way to look at it, it's probably an institution, and by historical acts, historical facts, the history of the institution, the present institution or the officials are held responsible for what their predecessors in office did." App. K, p. A-127-8.

The evidence upon which "intent to discriminate" was found was historical

data going back as far as thirty years from the date of trial. This evidence consisted of the following:

(1) Unidentified company officials told four Black employees that they could not transfer into the Blacksmiths bargaining unit because the Blacksmiths would not like it. These incidents took place in the 1950's. The Black employees never filed formal transfer requests. (Findings of Fact, para. 37-44)

(2) Experts on labor history testified on the history of racism in the labor movement in general.

(3) No Blacks transferred in the Blacksmiths bargaining unit between 1948 and 1968. Many reasons for this can be given: few Blacks were hired by the Company, Blacks may not have wanted to transfer, and the Company appears to have discouraged Blacks from transfer-

ing.

(4) Certain changes in the Blacksmiths 1949-51 collective bargaining agreement with Ladish were made. These changes supported the court's inference that the Blacksmiths were attempting to keep Blacks out of their bargaining unit.

(5) Blacksmith union bargaining committee chairman testified that while he had no prejudice toward Blacks, some members of the union did not share his feelings. (Finding of Fact, para. 45).

The Blacksmith's do not question the trial court's authority to weigh this evidence and draw reasonable inferences from it. However, in concluding that the seniority system in question was not bonafide because it was maintained for the purpose and with the intent and effect of discrimi-

nating against Blacks, the court stepped outside the bounds established in Teamsters v. U.S., 431 U.S. 324 (1977). The purpose of Title VII is to provide remedies for discrimination suffered by minorities. Those remedies include measures to promote equal employment opportunity and to provide monetary compensation for the victims. It has been an open question just how far back the court will search to find evidence of discriminatory intent. If one wishes to go back far enough, discrimination against minorities can be found in almost every institution in this society, including most businesses and unions. The Blacksmiths contend that it is not the purpose of Title VII to ferret out such discrimination.

There are several reasons for not conducting a penetrating and extensive

historical search. One is that there is no real remedy for discrimination which occurred twenty and more years ago. It is only current employees who can be given better employment opportunities. A second is that it is very difficult to prove exactly who discriminated and in what way when names cannot be remembered and witnesses cannot be produced and cross examined. The finder of fact is forced to base its conclusions on tenuous inferences and highly circumstantial evidence. Finally, to assess monetary damages for discrimination which occurred over ten years before the Civil Rights Act of 1964 was adopted is more punitive that it is compensatory.

Teamsters was intended to protect seniority systems in effect prior to the enactment of Title VII. It was not intended to authorize an extensive

search into the history of either an employer's or a union's relations with minorities.

II. In an Employment Discrimination Action, Where the Employer Enters Into a Consent Decree Which Settles It's Financial Obligation to the Plaintiffs, the Non-Settling Defendant Union, If Found Liable at Trial, Should Have Damages Apportioned According to It's Actual Liability.

A. Present Policy is that the Trial Court Will Not Rule on Possible Contribution or Indemnification Where a Non-Settling Defendant May Be Liable for More than It's Equitable Share.

Trial courts have the authority to approve consent decrees entered into by plaintiffs and one or more defendants

in actions involving complex and costly litigation. A consent decree in class action employment discrimination cases typically involves agreement by the employer to certain remedial measures which promote equal employment opportunity at the workplace. The settlement may also involve monetary payment to the defendants. In the present case, the settlement involved both of these features. Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981). It should be noted that Ladish settled its total financial obligation to the plaintiffs for $200,000, 89 F.R.D. at 684. The result of the settlement is that the employer will not have to pay any more money to the plaintiffs regardless of the total amount of damages found. That amount will be the obligation of the non-

settling defendant. Thus, the non-settling defendant is liable for more than its equitable share of the damages.

The consent decree in this case explains the distribution of the $200,000 settlement and states:

> "This will not preclude plaintiffs from recovering additional fees, costs and expenses from non-settling defendants." 89 F.R.D. at 685.

The court also stated that in regard to the defendants ability to pay:

> "The factor of defendants' ability to pay is not relevant to this case." 89 F.R.D. at 681.

This procedure is consistent with other district courts' practice. The court will not rule on "contribution" or "indemnification" between settling and non-settling defendants because (1) the non-settling defendant is not a party to the consent decree and (2)

the issue is premature because the existence of liability is not established until trial. In re Corrugated Container Anti-Trust Litigation, 643 F.2d 195 (5th Cir. 1981), In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), Seiffer v. Topsy's Intern., Inc., 70 F.R.D. 622 (D. Kan. 1976), Herbst v. International Tel. & Tel. Corp., 72 F.R.D. 85 (D. Conn. 1976) and Wainwright v. Kraftco Corp., 53 F.R.D. 78 (N.D. Ga. 1971).

The courts have actually confused the issue as to whether non-settling defendants have a right to object to the terms of a consent decree to which they are not parties, in contrast to their right as parties to the suit to not be required to pay more than their equitable share of damages. Some support for the right to indemnification was noted in In re Beef Industry, supra,

where the court acknowledged the opinion of Professor Newbery:

> "non-settling defendants... may object to any terms which preclude them from seeking indemnification from settling defendants." Supra at 172.

In practice, however, courts do not allow non-settling defendants to seek apportionment of damages. Nor do they have a remedy if the consent decree is silent, since they are not parties to that agreement.

An argument could be raised that a non-settling defendant has no right to object to the result because it had the opportunity to enter into the consent decree and thus define and limit its liability. This argument is fallacious for three reasons:

(1) The non-settling defendant may have a good faith belief that it did not discriminate. If defendants must enter into consent decrees only

out of fear that they will otherwise be liable for a disproportionate share of the damages, the process becomes more akin to blackmail than to a fair and reasonable settlement of differences.

(2) Where the non-settling defendant is a union, it has little power to take remedial measures to promote equal employment opportunity. That is almost exclusively within the power of the employer. In this case, the Blacksmith union was found guilty of an "intent" to discriminate on the basis of certain contract language and other alleged practices which took place between twenty and thirty years ago. The remedy to be implemented by the employer under the terms of the consent decree is to hire, promote and transfer qualified minorities. The Blacksmiths have no objection to this.

Moreover, the question is moot in regard to them since their bargaining unit has shrunk from approximately 1,000 to 450 members, with hiring and promotion opportunities being almost non-existent. Their involvement in the consent decree is irrelevant.

(3) The Blacksmith's union has extremely limited financial resources in comparison with the employer, Ladish Company. It did not have the ability to "buy its way" into a settlement, to any meaningful degree.

For these reasons, the present policy of not apportioning damages where a consent decree settles the financial obligation of some defendants but not others should be changed.

B. The Policy of Apportionment of Damages As In Duty of Fair Representation Cases Should Be Adopted.

Duty of Fair Representation cases, which are brought under the National Labor Relations Act, can involve a finding that both the employer and the union have breached the duty and are liable for damages. Vaca v. Sipes, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967) established the principle that damages must be apportioned between the employer and union according to the fault of each.

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." At 386 U.S. at 197, 198.

The principle was reaffirmed in Czosek v. O'Mara, 397 U.S. 25, 25 L. Ed. 2d 21, 90 S. Ct. 770 (1970).

"The petitioning union defendants ...[insist] that they may not be sued alone for breach of duty when the damage to employees had its roots in their discharge by the railroad prior to the union's alleged refusal to process grievances. Apparently fearing that if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible, the petitioners claim error in the Court of Appeals' affirmance of the dismissal of the suit against the railroad. These fears are groundless. The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action. If these allegations are not made and the employer is not a party defendant, judgment against petitioners can in any event be had only for those damages that flowed from their own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances

> added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." 397 U.S. at 28, 29

The principle has been followed consistently by Courts of Appeals in recent cases. Milstead v. International Bro. of Teamsters, Etc., 649 F.2d 365 (6th Cir. 1981), Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980), Self v. Drivers, Chauffers, Warehousemen, Etc., 620 F.2d 439 (4th Cir. 1980), Anderson v. United Paperworkers Intern. U., Etc., 641 F.2d 574 (8th Cir. 1981), Wells v. Southern Airways, Inc., 616 F.2d 107 (5th Cir. 1980) and Miller V. Gateway Transp. Co., Inc., 616 F.2d 272 (7th Cir. 1980).

The United States Supreme Court has recognized the inequity which would re-

sult from allowing damages to be paid by only one of the parties liable for illegal conduct. Duty of Fair Representation cases are closely analogous to the present case in that both the employer and union may be liable to employees for violation of a statutory right. The Blacksmiths contend that the same principle of apportionment of damages should apply in both cases.

C. Apportionment of Damages Between Defendants Liable for Violation of Title VII Is Appropriate Where A Consent Decree Precluded Any Possibility of Contribution or Indemnification.

The federal common law right to contribution, while generally recognized, was discussed in regard to Title VII actions in Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 67 L. Ed.

2d 750, 101 S. Ct. 1571 (1981). See 451 U.S. at 84, Footnote 11 on the common law right to contribution.

In Northwest Airlines, aggrieved female employees sued the employer under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 for backpay due to wage differentials between male and female cabin attendants. The employer was held liable and sued the union for contribution based on the fact that the collective bargaining agreement containing the discriminatory provisions had also been agreed to by the union.

The court held that the employer had no right to contribution from the union under either Title VII or federal common law. Title VII could not be interpreted to support a statutory right to contribution because the statute was expressly directed against

employers. 451 U.S. at 92. No manifestation of congressional intent for the remedy of contribution could be found. As for the body of federal common law which has recognized contribution, that is limited, according to the court, to situations where congress has not developed a statutory scheme.

The issue with which we must deal is whether Northwest Airlines precludes apportionment of damages between the employer and union in this case. The Blacksmith's union contends that it does not.

In Northwest Airlines the plaintiffs sued only the employer. The employer then brought a separate action for contribution against the union. It would seem clear that Title VII was not enacted for this purpose. However, in the present case, both the employer and union were found liable to the plaintiffs

for damages. The employer, however, is not part of the suit because of the settlement agreement. The union has no basis to seek contribution from the employer. Rather, the union seeks to have damages apportioned so that it is required only to pay for that proportion of the damages it actually caused.

While the present case does not involve contribution, Northwest Airlines need not be read to preclude the possibility of contribution for a union. Title VII is aimed at discrimination by employers. It is an extremely rare case where a union, alone, is liable for discrimination. Thus, unions should have the remedy of contribution available to them.

The other reason why Northwest Airlines is inapplicable to this case is because the inequity did not arise

under Title VII, but as a result of the consent decree. The remedy being sought is not a Title VII remedy. Neither congress nor the federal courts have developed any body of law to deal with the liability of non-settling defendants. Thus, it is appropriate to apply federal common law to this situation, because it is not precluded by any statutory remedy.

D. In Spite of the Inability of the Non-Settling Defendant Union to Obtain Any Protection Against Liability for a Disproportionate Share of the Damages, the Settling Defendant Company Was Able to Obtain the Right to Contribution.

Further evidence of the one-sided protection available to the settling defendant is reflected in the fact that

the employer, Ladish Co., was able to obtain the right to contribution from non-settling defendants as part of the consent decree.

"IX. ATTORNEYS' FEES

> Counsel for plaintiffs shall receive from Ladish Co. attorneys' fees, costs and expenses in an amount agreed upon by the plaintiffs and Ladish Co. and approved by the Court, or if no approval is granted, an amount set by the Court. Such amount shall not preclude plaintiffs from recovering additional fees, costs and expenses from the nonsettling defendants." Wattleton v. Ladish Co., Civil Action No. 75-C-746, Consent Decree at 10. App. D, p. A-53.

This provision was clearly intended to state a right to contribution for the settling defendant.

It would be grossly inequitable for the court to allow one defendant in a suit the right to contribution without allowing other defendants the same right.

III. A Fair Trial on Liability Under

Title VII Cannot Be Conducted Where the Major Defendant, the Employer, Has Settled Any Potential Obligations to the Plaintiffs Prior to Trial.

The defendant employer in this case entered into a consent decree with the plaintiffs through which it discharged all obligations to the plaintiffs prior to a trial on liability. The result was a trial in which the employer did not participate, although the court did attempt to determine its liability. The unions were on trial and attempted to prove that they had not discriminated against the plaintiffs.

The Blacksmiths contend that when the employer settled with the plaintiffs, the Blacksmiths and other unions should have been dismissed. Title VII is intended primarily to remedy discrimination perpetrated by employers. Unions,

if liable at all, are usually only secondarily liable for their participation in or acquiescence to discriminatory contract provisions. To hold a union liable for the damages accumulated in this protracted class action suit is contrary to labor policy in this country. The problem is exacerbated by the fact that the union in question is a small, craft union with extremely limited resources. The practical effect of holding the Blacksmiths liable for the damages will very likely be bankruptcy.

For these reasons, the Blacksmiths argue that the verdict of the trial court, and the maintenance of the trial itself were contrary to public policy. The verdict of the trial court should be overturned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Milwaukee, WI 53202
(414)271-5655
Attorney for Petitioner.

82-1087
NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

PETITIONER

v.

WILLIAM WATTLETON, et al.,

and

STEVE T. TILLMAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

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CONTENTS OF APPENDIX

APPENDIX A
(Opinion)

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2411

WILLIAM WATTLETON, et al.,

Plaintiffs-Appellees,

and

STEVE T. TILLMAN, *et al.*,

Plaintiffs-Intervenors-Appellees,

v.

THE INTERNATIONAL BROTHERHOOD OF BOILER MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 75 C 746—John W. Reynolds, *Chief Judge.*

ARGUED APRIL 2, 1982—DECIDED AUGUST 16, 1982

Before CUMMINGS, *Chief Judge,* POSNER, *Circuit Judge,* and LEIGHTON, *District Judge.**

---

* Honorable George N. Leighton, District Judge for the Northern District of Illinois, sitting by designation.

LEIGHTON, *District Judge.* In this appeal by a local union of blacksmiths, we are asked to resolve two issues. First, whether the district court's findings of fact concerning the seniority system contained in the union's collective bargaining agreements with the Ladish Company of Cudahy, Wisconsin are clearly erroneous. Second, whether the district court erred in concluding that the seniority system in question is not bona fide within the meaning of Section 703(h) of Title VII because it was negotiated and maintained for the purpose, and with the intent and effect, of discriminating against Negroes employed by Ladish.

We hold that the district court's findings are not clearly erroneous; they are supported by substantial evidence in the record. And, in our judgment, the court was correct in concluding that the union's seniority system is not bona fide within the meaning of Section 703(h) of Title VII. Therefore, we affirm the district court. The following is a summary of its findings.

I

The Ladish Company is a major employer in the Milwaukee, Wisconsin area, the plant here involved being in Cudahy, a Milwaukee suburb. The company produces and finishes metal products; it does significant contractual work for federal agencies and has been in production since 1927. Ladish is a unionized employer; and during the time relevant to this case, it has had collective bargaining agreements with seven unions. However, the only one in this appeal is the appellant, Local #1509 of the International Brotherhood of Boiler Makers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (hereafter referred to as the Blacksmiths).

Prior to World War II, few Negroes lived in the Milwaukee area. But in the post-war period, they began to migrate from the Deep South and settled in and around the city where their population increased steadily. They were limited in the purchasing of homes and the renting of apartments to areas of Milwaukee where

living arrangements were substandard; and at the same time, there were racially discriminatory practices against Negroes in employment opportunities, in the location of schools, and in everyday social contacts. And at Ladish's Cudahy plant, no Negroes were employed prior to 1948; but their number in the workforce increased as the years progressed into the '50's.

The minimum ability requirements for the greatest majority of jobs in the Ladish plant were simple literacy and good health. Although the company sought skilled craftsmen to fill certain of the journeyman jobs and apprenticeable trades, most of its employees at the entry level were hired with little, if any, skills; consequently, most of them learned while on the job. The Negroes hired between 1948 and 1968 were neither less skilled, less qualified, nor less apt to learn job skills than were the Caucasians hired during the same period. All Negroes, however, were assigned jobs in the Machinists' unit, assignments that were solely made by Ladish, intentionally and based on race. The jobs to which the Negroes were assigned were mainly as grinders and truckers: the dirtiest, lowest paid, and least desirable.

During the same period, Caucasians hired by Ladish were assigned jobs in the Blacksmiths' bargaining unit, and under the jurisdiction of other union locals. It was Ladish's policy to allow inter-bargaining unit transfers by all of its employees during the period in question; but the seniority system maintained by the Blacksmiths and the other unions discouraged transfers by employees who had been with the company for a significant period of time because the result subjected an employee to possible layoff, or forced him to accept the least desirable job in his new unit. At various times from August 1949, Caucasian employees of Ladish transferred from jobs within the jurisdiction of other bargaining units to those within the jurisdiction of the Blacksmiths, all of them, for a period at least, utilizing their carryover seniority for layoff and recall purposes. However, no Negro employee succeeded in effecting such a transfer despite existing advantages in jobs under the Blacksmiths.

In 1973 and 1974, the Office of Federal Contract Compliance (OFCC) conducted an audit of Ladish's Cudahy facility which included an analysis of the company's then existing workforce. In response to OFCC requests, and in compliance with its obligations as a federal contractor, Ladish prepared detailed information concerning its employees. It listed all of Cudahy's hourly employees hired from August 1948 to December 1967, the distribution of those hirings by bargaining units, a list of those minorities the company hired prior to January 1, 1968 who were still employed in 1974, and a distribution of the company's hirings by bargaining unit. The audit eventually focused on whether Ladish's then existing workforce had an "affected class"; that is, a class consisting of employees who by virtue of past hiring discrimination, and by the nature of the limited seniority carryover provisions of the pertinent collective bargaining agreements, were in a position that they continued to suffer the present effects of past racially discriminatory acts. Based on its audit, its examination of documents and evidence furnished by Ladish, OFCC concluded that an affected class existed at Ladish, consisting of all Negroes who were hired by the company prior to January 22, 1968, and who were placed by Ladish in jobs under the jurisdiction of the Machinists.

II

Shortly after the OFCC reached the conclusion that Ladish had an affected class of Negro employees who had suffered employment discrimination, the first of 18 Negroes employed by Ladish filed a charge of employment discrimination with the Milwaukee office of the Equal Employment Opportunity Commission, naming as respondents the Ladish Company and the seven unions with which it had collective bargaining agreements. He alleged that:

> Prior to 1968, Ladish Company maintained a segregated hiring policy wherein all Black workers were hired into Union contracted Machinists jobs, which were the lowest paying jobs available at the

> Company. Such a policy has led to a current and continuing system of discrimination in seniority, wages and promotion. As a Black employee, I and others similarly situated, have been discriminated against as a result of Ladish's past policies of segregated hiring and resultant seniority and salary system. The affiliated Unions have contributed to this discrimination via the Union Contract.

On various dates thereafter, EEOC letters telling the complainants of their right to sue in the appropriate United States district court were issued; and on December 29, 1975, this suit was filed by 11 Negro employees of Ladish, on their behalf and on behalf of all others similarly situated. Later, seven other Negro employees filed similar EEOC charges, received letters concerning their right to sue; and on May 3, 1977, filed a motion for leave to intervene as plaintiffs in the suit. This was allowed; and on February 12, 1980, the district court granted, in part, plaintiffs' motion to certify the class, the order stating that:

> . . . [F]or the purpose of determining the first claim, i.e., whether the seniority system maintained by the defendants . . . is a 'bona fide seniority system' within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), this action is hereby certified as a class action on behalf of all blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969.

On the same date, the court granted a motion that severed the issue of liability from those of damages and remedies, in the event liability was established at trial. Then, at a conference held on November 3, 1980, plaintiffs, the Ladish Company, and four of the seven unions, informed the district judge that they were prepared to

settle the case as to them.[1] They reported agreement to a proposed consent decree, and requested a hearing. Notices were issued to members of the class, a date was set for the court to hear objections, approve or disapprove the consent decree, and enter an appropriate order. The hearing, a lengthy one, was begun on December 22, 1980; and on February 13, 1981, the court reviewed the proposed consent decree in the light of many factors, and issued a Memorandum approving it. *Wattleton v. Ladish Co.*, 89 F.R.D. 677 (E.D. Wis. 1981).

The effect of the settlement was to remove the Ladish Company and the four unions from the suit. This having been done, the remaining issues between plaintiffs, the remaining union locals: the Machinists,[2] the Die Sinkers,[3] and the Blacksmiths, were set for trial. They were heard to the court on plaintiffs' contention that (1) Ladish, with the full knowledge, cooperation and complicity of the three unions, maintained a policy and practice of hiring Negroes and assigning them to the dirtiest, lowest paying, and least desirable jobs within the jurisdiction of the Machinists; (2) Ladish, with the acquiescence of the three unions, maintained a policy of refusing to promote and transfer Negroes to better paying and more desirable jobs within their jurisdictions; (3) the three unions, by reason of seniority systems in their respective collective bargaining agreements, perpetuated the initial discrimination against Negroes because their seniority systems prevented them from transferring to better paying and more desirable jobs

[1] The unions were (1) International Federation of Professional and Technical Engineers, Local #92 (IFPTE); (2) International Brotherhood of Firemen and Oilers, Local #125 (IBFO); (3) International Brotherhood of Electrical Workers, Local #494 (IBEW); and (4) Associated Unions of America, Local #500 (AUA).

[2] The International Association of Machinists and Aerospace Workers, District No. 10, Local #1862 (Machinists).

[3] International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 (Die Sinkers).

with full carryover seniority within the respective jurisdictions; and (4) that the Machinists' bargaining unit failed to properly and fairly represent its Negro members.

After hearing evidence, the district court made findings of fact and reached conclusions of law published in *Wattleton v. Ladish Co.*, 520 F.Supp. 1329 (E.D. Wis. 1981). It found that during the period in question, all persons who were hired by Ladish and given jobs in the Machinists' and Die Sinkers' bargaining unit were accepted without regard to race or national origin, 520 F.Supp. at 1338; and that the Machinists did not fail to properly and fairly represent their Negro members. 520 F.Supp. at 1347. But as to the Blacksmiths, the district court weighed the credibility of four Negroes who testified about their work experience at Ladish, reviewed the record, and found that no Negro employee in the Cudahy plant transferred to a job under the jurisdiction of the Blacksmiths because its members, expressing its policy, made it clear to Ladish, and to the Negroes, that the local union would not accept them into its bargaining unit, 520 F.Supp. at 1341; that the OFCC determinations, the testimony of Ladish's Negro employees, and the operation of the challenged systems were persuasive evidence that the seniority provisions had perpetuated the effects of prior discriminatory practices and have carried their effects into the present, 520 F.Supp. at 1341; that the challenged seniority systems in the separate bargaining units were rational, in conformance with industry practice, and with the provisions of the National Relations Act, 520 F.Supp. at 1342; and that because they were originally negotiated at a time when Negroes were not employed at Ladish, the seniority systems of the three unions, including the Blacksmiths', did not have their genesis in racial discrimination. 520 F.Supp. at 1343.

Having made these findings, the court then turned to the question whether the challenged seniority systems, after their genesis, were thereafter negotiated and maintained free from any illegal purpose. 520 F.Supp. at 1343.

It found that there being no evidence to the contrary, the Negro plaintiffs had not established that the seniority systems which existed under the collective bargaining agreements between Ladish, the Machinists, and the Die Sinkers were maintained with a purpose and intent to discriminate against them. 520 F.Supp. at 1346. But tracing the history of the Ladish-Blacksmiths' collective bargaining agreements, as it had in those between Ladish and the other two unions, the district court found that while the Blacksmiths' seniority system under examination was essentially the same as the one contained in the original agreement, the provisions had not been carried forward unchanged. In fact, there had been three changes, and all of them "coincided with the time Ladish first began to hire blacks in 1948 . . . or with times of a steady increase in the hiring of blacks at Ladish." 520 F.Supp. at 1345.

The first change was included in the agreement effective August 22, 1949 to September 30, 1951 and provided that plantwide seniority would carry over to jobs under the jurisdiction of the Blacksmiths for purposes of layoff. This difference benefitted only Caucasians who, without difficulty, transferred into the Blacksmiths' bargaining unit; no Negro was successful in making such a transfer. The second was elimination, in the same collective bargaining agreement, of a nondiscrimination clause that was not again included in an agreement between Ladish and the Blacksmiths until passage of Title VII in 1964. The third was inclusion in the August 22, 1949 agreement of a provision regarding interbargaining unit transfers which stated that:

> Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred.

The district court found that on August 22, 1949 "and thereafter, [this provision] gave the Blacksmiths virtual veto power over interbargaining unit transfers." 520 F.Supp. at 1345.

Based on the evidence that showed these three changes, the evidence relating to the feelings of individual blacksmiths toward transfers by Negroes to jobs in their unit, the evidence which showed that Caucasians transferred to jobs under the Blacksmiths with full carryover seniority while at the same time Negroes were discouraged from doing so; and having drawn reasonable inferences therefrom, the district court found "that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths." . . . 520 F.Supp. at 1346; and, "that the seniority systems negotiated between Ladish and the Blacksmiths have and were intended to have a disparate impact on black workers at Ladish." 520 F.Supp. at 1347. Therefore, the court concluded that "the seniority system of the Blacksmiths is not bona fide within the meaning of 703(h) of Title VII." In this appeal, the Blacksmiths contend that the district court's findings are clearly erroneous; and that there was error in the conclusion reached.

III

A

Rule 52 (a), Fed. R. Civ. P., broadly requires that in a non-jury case the district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses [sic]." *Pullman-Standard v. Swint*, ... U.S. ....., 102 S.Ct. 1781, 1789 (1982). One purpose for this requirement is to aid review by affording a clear understanding of the ground or basis of the decision. *Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir. 1978). Another is to make definite just what is decided in order to apply the doctrine of estoppel and res judicata in future cases. Wright & Miller, Federal Practice & Procedure: Civil 2571. Finally, and perhaps more important, requiring the making of find-

ings is intended to evoke care on the part of the trial judge in ascertaining the facts. Wright & Miller, *supra*; and see *United States v. Merz*, 376 U.S. 192, 199 (1964); *United States v. Forness*, 125 F.2d 928, 942 (2nd Cir. 1942), *cert. denied sub nom., Salamanca v. United States*, 316 U.S. 694 (1942). A district court's findings are presumptively correct and the burden of persuading us that they are "clearly erroneous" rests upon the Blacksmiths. *Case v. Morrisette*, 475 F.2d 1300, 1305 (D.C. Cir. 1973); see *Culbertson v. Jno. McCall Coal Company, Inc.*, 495 F.2d 1403, 1405 (4th Cir. 1974). But, in our judgment, they have not discharged this burden.

In so deciding, we have reviewed the record in order to make sure that the trial court adequately performed its function. *Ramey Const. Co., Inc. v. Apache Tribe, etc.*, 616 F.2d 464, 467 (10th Cir. 1980); *cf. Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977). However, "[w]e, as an appellate tribunal, may not retry the case or substitute our judgment for that of the trial judge. It is he, who after judging the credibility of the witnesses, weighing the evidence, and drawing inferences, makes factual determinations." *Brennan v. Midwestern United Life Insurance Company*, 417 F.2d 147, 149 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). These determinations are entitled to very careful consideration, *Bauer v. Bailar*, 647 F.2d 1037, 1042; they are not to be set aside unless this court, on reviewing all the evidence, is left with a definite and firm conviction that a mistake has been committed. *Armstrong v. Brennan*, 539 F.2d 625, 634 (7th Cir. 1976), *vac., Brennan v. Armstrong*, 433 U.S. 672 (1977); *cf. Hayes v. Thompson*, 637 F.2d 483, 490 (7th Cir. 1980); *see Whitley v. Seibel*, 676 F.2d 245, 252 (7th Cir. 1982).

With these principles in mind, we notice that the district court heard the following evidence. First, the testimony of the Negro employees of Ladish who described their experiences when they tried, or expressed the desire, to transfer from jobs under the jurisdiction of the Machinists to those in the Blacksmiths' bargaining unit. Second, the testimony of two

experts, one an authority on the history of labor unions in this country, but particularly of the experiences of Negroes with racism in the American labor movement. Third, statistics which plaintiffs offered to show the disparity between the number of Negroes and Caucasians who, during the period 1948 and 1968, obtained transfers into the Blacksmiths; it appearing from the data that no Negroes transferred to the Blacksmiths while Caucasians did so without difficulty and in fact with carry-over seniority. Fourth, documents, but more important, copies of the collective bargaining agreements negotiated by the Die Sinkers, the Machinists, and the Blacksmiths; but as to the latter local union, the collective bargaining agreements contained changes which affected the Blacksmiths' seniority system. Fifth, the witnesses called by the Blacksmiths, some of them members of the Negro race, who testified in support of the local's contention that it had not negotiated or maintained a seniority system for the purpose of discriminating against Negroes because of their race.

The court weighed the evidence, resolved testimonial conflicts, and made findings concerning the parties, the communities in which they lived, the people from whom Ladish drew its workforce, and the racially discriminatory impact of the company's hiring and work assignment policies. It looked at the audit determinations made by the Office of Federal Contract Compliance in 1973, and the operation, over the years, of the challenged seniority systems. In judging the credibility of four of the Negroes who testified, the able and experienced district judge acknowledged, 520 F.Supp. at 1341, that "[s]uch a determination is, by nature, subjective; but determining whether invidious discriminating purpose was a motivating factor required a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 266 (1977).

This was a proper discharge of judicial functions. Neither our examination of the record nor any point

raised in this appeal leaves us with a definite and firm conviction that a mistake was committed by the district court in its factual findings; we cannot say that they are clearly erroneous. *Culbertson v. Jno. McCall Coal Company, Inc.*, 495 F.2d 1403, 1405 (4th Cir. 1974); *Davis v. Murphy*, 587 F.2d 362, 364 (7th Cir. 1978). Therefore, we turn to the question whether the court erred in concluding that the Blacksmiths' seniority system is not bona fide within the meaning of Section 703(h), Title VII.

B

Title VII of the Civil Rights Act of 1964 makes unlawful practices, procedures, or tests that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). To this rule, Section 703(h) of the Act, 42 U.S.C. §2000e-2(h) provides an exception:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race. . . .

California Brewers Ass'n v. Bryant, 444 U.S. 598, 600 (1980). This exception extends not only to Title VII actions, but also bars section 1981 claims. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-1192 (5th Cir. 1978). It applies to seniority systems with a disparate racial impact only when "differences in treatment [are] not the result of an intention to discriminate because of race." *International Bro. of Teamsters v. United States*, 431 U.S. 324, 353 (1977); *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1118 (5th Cir. 1981). Accordingly, it has been held that provisions for seniority rights "designed or operated to discriminate on an illegal basis is not a 'bona fide' system." *Acha v. Beame*, 570 F.2d 57, 64 (2nd Cir. 1978); and see *United Airlines, Inc. v. Evans*, 431 U.S. 553, 559 (1977).

Section 703(c)(1) of Title VII, 42 U.S.C. §2000e-2(c)(1), provides that:

> It shall be an unlawful employment practice for a labor organization—
>
> > to exclude . . . from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; . . . .

Thus, it is clearly a violation of this section for a union, international or local, to maintain a seniority system for the purpose of excluding Negroes from membership because of their race; and certainly, such a system is not protected by the exception in section 703(f) of Title VII. *Hameed v. Intern. Ass'n of Bridge, etc.*, 637 F.2d 506 (8th Cir. 1980); *Glus v. G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980); *Freeman v. Motor Convoy, Inc.*, 409 F.Supp. 1100 (N.D. Ga. 1975); *United States by Clark v. United Papermakers & Paperwork*, 282 F.Supp. 39 (E.D. La. 1968). Therefore, after findings that the Blacksmiths negotiated and maintained their seniority system for the illegal purpose, and with the intent and effect, of discriminating against Negroes because of their race, the district court could only conclude that the system is not bona fide within the meaning of section 703(h) of Title VII. *International Bro. of Teamsters v. United States*, 431 U.S. 324, 346 (1977); *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 454 F.Supp. 158, 179 (D. Kan. 1978); *rev'd on other grounds*, 645 F.2d 1365 (10th Cir. 1981). For these reasons, the judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

(DECISION AND ORDER)

WILLIAM WATTLETON, et al.,

Plaintiffs,

v.

THE LADISH COMPANY, et al.,

Defendants.

DECISION AND ORDER

Civil Action No. 75C746

DECISION AND ORDER (2/12/80)

Plaintiffs in this action are black employees of the Ladish Company who allege that the company and the defendant labor unions have been and are engaged in discriminatory employment practices. Plaintiffs seek declaratory and injunctive relief for themselves and "others similarly situated." The action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. Currently before the court is plaintiffs' motion for class certification.

Plaintiffs' central allegation is that prior to 1968, the Ladish Company followed a policy of assigning newly-hired black employees only to positions that were under the jurisdiction of the International Association of Machinists. Plaintiffs contend that these were for the most part the company's least desirable and lowest paying positions. Plaintiffs further contend that the company's collective bargaining agreements with the defendant labor unions do not permit employees to transfer to positions under the jurisdiction of other unions without losing accumulated seniority. This, it is alleged, has the effect of locking black employees into their positions with the machinists' union because of the penalty exacted upon transfer to a position under the jurisdiction of another union.

In addition to themselves, the named plaintiffs seek to represent the following class consisting of:

> All blacks who were hired for jobs that were within the jurisdiction of the International Association of Machinists & Aerospace Workers, Local 1862; were employed by the Ladish Company as of December 30, 1969; and had been hired prior to January 22, 1968.

Plaintiffs are black employees who were employed by the Ladish Company as of December 30, 1969, had been hired prior to January 22, 1968, and were assigned to positions under the jurisdiction of the machinists' union.

In Title VII actions, as in other actions, plaintiffs seeking certification as a class must demonstrate that they meet the conditions imposed by Rule 23 of the Federal Rules of Civil Procedure. *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 405-06 (1977). Rule 23(a) contains four prerequisites that must be met before a suit may be maintained as a class action. They are:

> "•••(1) the class is so numerous that joinder of all members is impraticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

In addition to meeting the four prerequisites of Rule 23(a), plaintiffs must also show that they meet one of the conditions set out in Rule 23(b). Plaintiffs argue that they come under Rule 23(b)(2) which provides that a suit may be maintained as a class action if —

> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Defendants argue that in light of *Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), the plaintiffs cannot meet the commonality and typicality requirements of Rule 23(a). The *Teamsters* Court held that an otherwise lawful seniority system is not subject

to attack on the ground that it has the effect of perpetuating discriminatory hiring practices which were engaged in prior to the enactment of Title VII of the Civil Rights Act of 1964 unless it can be shown that the practices were maintained with a purpose and intent to discriminate (hereinafter "first claim"). In contrast, persons who were subject to discriminatory hiring practices *after* 1964 need only show that the challenged seniority system has the effect of perpetuating prior illegal discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (hereinafter "second claim"). Thus, the defendants argue that since the named plaintiffs in this action were all hired prior to the enactment of Title VII, they can only prevail on the first claim; and since they seek to represent all blacks hired by the Ladish Company prior to January 22, 1968, and since a significant number of them (i.e., employees hired after 1964 and before January 22, 1968) (hereinafter "64-68 sub class") need only prevail on the second claim in order to end discrimination, the plaintiffs are not representative of those members of the class who could prevail on the second claim.

Defendants are correct in that plaintiffs cannot represent the 64-68 sub class on the second claim, but it does not follow that the plaintiffs cannot represent the class, including the 64-68 sub class, on the first claim which is common to the 64-68 sub class as well as to the whole class.

Defendants also argue that plaintiffs should be precluded from representing the class on the first claim because they have "failed to demonstrate the existence of a realistic claim that the seniority systems are not bona fide." (Defendant Ladish Company's second brief in

opposition to plaintiffs' motion for class certification filed August 21, 1979, at 39) (underlining omitted). This argument, however, is without legal support in that a motion for class certification is not dependent on the merits of the underlying case. "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). Whether or not plaintiffs can demonstrate that the seniority system is in itself unlawful in that it was maintained with a purpose and intent to discriminate will be decided at trial. For purposes of this motion, the Court need only consider the requirements of Rule 23. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Miller v. Mackey International, Inc.,* 452 F.2d 424, 427 (5th Cir. 1971).

Turning then to Rule 23, the Court finds that plaintiffs have met the requirements set forth therein. The proposed class is in excess of two hundred persons. This is a large enough class to meet the numerosity requirement of Rule 23(a). See *Swanson v. American Consumer Industry, Inc.,* 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969).

There are questions of law and of fact which are common to the class. Plaintiffs contend that defendants' seniority system discriminates on the basis of race. To use the term of art, they claim the system is not bona fide. Whether or not this is so depends on how the system operates and has operated in the past, as well as the legal definition of a "bona fide seniority system." Such questions are common to the class as a whole in that every

member of the class is a black employee who is bound by the challenged system. If the system under the first claim is found to be discriminatory, every member of the class will be entitled to relief. Whether or not the system is discriminatory under the first claim is a question common to the class, including the sub class. Thus plaintiffs meet the typicality requiretment of Rule 23(a).

I find that plaintiffs will adequately represent the interests of the class. There is no indication that there is any conflict between the interests of the plaintiffs and those of the class. The interest of the class is in obtaining a modification of the seniority system which keeps members locked into allegedly inferior jobs. Plaintiffs' suit seeks to advance these interests. Plaintiffs are represented by competent counsel with much experience in employment discrimination litigation.

Finally, with respect to the Rule 23(b)(2) requirement, the Court is of the opinion that defendants have acted on grounds generally applicable to the class, and that if plaintiffs prove the first claim injunctive relief will be appropriate with respect to the class as a whole. The conditions and limitations of the seniority system which the class is subject to are mandated by the collective bargaining agreements entered into by the Ladish Company and the defendant unions. These agreements are the basis for defendants' actions. They are generally applicable to members of the class in that it is on this basis that members of the class are unable to transfer to other employment positions without facing the loss of accumulated seniority. If the plaintiffs prevail on the first claim and this system is determined to be illegal, the class as a whole will be entitled to final injunctive relief. Plaintiffs thus meet the requirements of Rule 23(b)(2).

Accordingly, plaintiffs will be permitted to represent the proposed class on the issue of whether defendants' seniority system is a "bona fide seniority system" within the meaning of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), i.e., the first claim, and the representative capacity of the named plaintiffs is restricted to that particular issue. Plaintiffs are not entitled to represent members of the class on the issue of whether defendants' seniority system has the effect of perpetuating post-1964 discriminatory hiring practices, i.e., the second claim. With this limitation, plaintiffs' motion for class certification will be granted.*

Plaintiffs have also moved to sever the issue of liability from the determination of what remedy is appropriate if

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*The named plaintiffs also argue that they should be allowed to represent the class with respect to certain equal pay and discriminatory representation claims that are alleged in the complaint. This argument appears to be somewhat of an afterthought as it is raised for the first time in plaintiffs' reply brief in support of their motion for class certification. Apparently plaintiffs hoped to provide alternative grounds for certification in the event that the *Teamsters* decision precluded certification of their challenge to defendants' seniority system.

The class has been defined with only the challenge to the seniority system in mind. Furthermore, other than the broad allegations in the complaint, there has been no showing of any particularized harm to any of the named plaintiffs. Thus, there is no way of determining whether plaintiffs' claims are representative of the class they seek to represent. Since the burden is on plaintiffs to show that they meet the requirements of Rule 23, their failure to do so precludes them from representing the class on the equal pay and discriminatory representation claims.

liability is established. Such a procedure in class actions of this nature promotes judicial efficiency and economy in that it avoids the unnecessary complexity of considering individual damage claims during the course of what is often a complicated trial on the issue of liability. If liability is established, individual claims for back pay and constructive seniority can often be handled by a special master. The potential for significant saving of time is obvious. Accordingly, plaintiffs' motion for severance will be granted.

IT IS THEREFORE ORDERED that for the purpose of determining the first claim, i.e., whether the seniority system maintained by the defendants in the above-entitled action is a "bona fide seniority system" within the meaning of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), this action is hereby certified as a class action on behalf of all blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969.

IT IS FURTHER ORDERED that plaintiffs notify every member of the above-defined class who can be identified through reasonable effort of the existence and nature of this action, and of the fact that any member of the class may be excluded from this action if he so requests, that judgment on the issue of whether defendants' seniority system is bona fide will bind all members of the class who do not request exclusion, and that any member who does not request exclusion may enter an appearance through counsel.

IT IS FURTHER ORDERED that plaintiffs' motion for severance of the liability stage of the trial from the determination of individual damages, if liability is established, be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 12th day of Feb., 1980.

/s/ John W. Reynolds
John W. Reynolds, Chief Judge

WILLIAM WATTLETON, et al.,

v. Plaintiffs, ORDER

THE LADISH COMPANY, et al., Civil

Defendants. Action

No.

75C746

CLASS ACTION ORDER

In the Decision and Order filed February 12, 1980, in the above-captioned matter, this Court certified a class as follows in this case:

> . . . for the purpose of determining . . . whether the seniority system maintained by the defendants in the above-entitled action is a "bona fide seniority system" within the meaning of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), this action is hereby certified as a class action on behalf of all blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969.

The Court, in its discretion, determines that notice to class members is appropriate. It is therefore ordered as follows:

1. Counsel for the defendant Ladish Company is hereby directed to provide counsel for plaintiffs, in writing, and with copies to all counsel of record and to the clerk, a list of the names and last known addresses of all blacks

known to Ladish Company who were employed by Ladish Company prior to January 22, 1968, for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862 and who were employed by the Ladish Company as of December 30, 1969.

2. Within twenty (20) days of the receipt of the list set forth in Paragraph 1 herein, defendant Ladish Company shall mail, by certified mail, a copy of the Notice of this action, a copy of which is attached hereto, to each class member listed whose name appears on the list prepared pursuant to Paragraph 1 hereof or whose name is furnished to counsel for Ladish Company by counsel for any party.

3. Expenses incurred in the certified mailing set forth above shall be taxed as costs of this action.

Pursuant to Rule 23(c)(2), this order is conditional and may be altered or amended before the final decision on the merits.

Dated at Milwaukee, Wisconsin, this 5th day of May, 1980.

/s/ John W. Reynolds
JOHN W. REYNOLDS, CHIEF JUDGE

APPENDIX D
(DECISION AND ORDER)

WILLIAM WATTLETON, et al., DECISION AND

Plaintiffs, ORDER

v. Civil Action

THE LADISH COMPANY, et al., No. 75C746

Defendants.

Also Found At 89 F.R.D. 677

DECISION AND ORDER (SENIORITY ISSUE)

I. *Introduction*

This is a civil action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq. ("Title VII"), 42 U.S.C. §1891, and 28 U.S.C. §§2201 and 2202, seeking declaratory and injunctive relief because of defendants' alleged racially discriminatory prac-

tices. The court has jurisdiction under 28 U.S.C. §1343 (4), 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. §§2201 and 2202.

Plaintiffs William Wattleton, Johnnie Robinson, Clayton Jacobs, John E. Armstrong, Abraham Leflore, Wardell Wilson, Clarence Suggs, Daniel O. Brown, Ruben Madison, Robert Spearmon, and Fred J. Colin, and plaintiffs-intervenors Steve T. Tillman, William Bell, Charles Jones, Charles C. Graves, Tommie L. Ballet, Henry E. Graves, and Willie Queary are all black citizens of the State of Wisconsin and the United States and reside in the Eastern District of Wisconsin. (The plaintiffs and plaintiffs-intervenors are hereinafter referred to as "plaintiffs"). All plaintiffs are present or former employees of the defendant Ladish Co. ("Ladish") and are present or former members of defendant union, the International Association of Machinists and Aerospace Workers, Local #1862 ("Local 1862"). Other defendants to this action are the International Federation of Professional and Technical Engineers, Local #92 ("Local 92"); the International Brotherhood of Firemen and Oilers, Local #125 ("Local 125"); the International Brotherhood of Electrical Workers, Local #494 ("Local 494"); the Associated Unions of America, Local #500 ("Local 500"); the International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 ("Lodge 140"); and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #1509 ("Local 1509").

On February 12, 1980, this Court issued an order and decision certifying this action as a class action on the limited issue of whether the challenged seniority system is "bona fide" within the meaning of Title VII. Those

plaintiffs identified as members of the above-defined class were notified in an order filed May 9, 1980, that as members of the class they had the following options:

> "1. If you do nothing, you will remain a member of the class and will be represented by Attorneys Percy L. Julian, Jr., and the law firm of Julian, Olson & Crandall, S.C., 330 East Wilson Street, Madison, Wisconsin 53701 (Phone: 608-255-6400) and Jonathan Wallas and the law firm of Chambers, Stein, Ferguson & Becton, P.A., 951 S. Independence Boulevard, Charlotte, North Carolina 28202 (Phone: 704-375-8461), who have filed this action on behalf of the plaintiffs and the class;
>
> "2. If you desire to remain in this case but wish to hire your own attorney, you may do so and have your attorney advise the Clerk of Court in writing that he represents you in this proceeding; or
>
> "3. If you desire to exclude yourself from the class, you may do so by sending a written response to the Clerk of Court whose address is Ms. Ruth LaFave, Clerk of Court, United States Courthouse, Milwaukee, Wisconsin 53202. The response should state 'I wish to be excluded from the class in the case of *Wattleton*, et al. v. *Ladish Co.*, et al., Civil Action No. 75-C-746' and you should sign you name to it. Said notice must be mailed or delivered to the Clerk by June 15, 1980."

In a status conference held on November 3, 1980, the plaintiffs and certain defendants informed the Court that they were prepared to settle all issues remaining in this case, and the Court determined that a hearing should be held thereon on Monday, December 22, 1980, at 9:30 a.m.

In furtherance thereof, on November 7, 1980, this Court issued a notice of hearing to consider and approve

the proposed consent decree and an order implementing the hearing to consider the proposed consent decree and providing for notice of the hearing. The notice and consent decree (attached hereto as Appendix "A") were mailed to the class members shown on Exhibits "A" and "B" to the consent decree on November 19, 1980, and a copy of the consent decree was made available to the public in the Clerk of Court's office.

On December 22, 1980, the Court conducted a hearing to approve or take objections to the proposed consent decree. The plaintiffs and certain defendants submitted the proposed consent decree for settlement of all issues remaining in the case and moved for approval of the settlement agreement. For the following reasons, the motion is granted and the settlement agreement between th plaintiffs and certain defendants is approved.

II. *Settlement of a Class Action*

Rule 23(e) of the Federal Rules of Civil Procedure provides:

> "(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

The Seventh Circuit has recognized that the essence of a settlement in compromise and that one of the benefits obtained from it is avoidance of the need for court resolution of disputed issues. *In Re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106 at 1132, n. 44 (7th Cir. 1979); *Patterson v. Stovall,* 528 F.2d 108, 112, 114 (7th Cir. 1976); *McDonald v. Chicago Milwaukee Corporation,* 565 F.2d 416 (7th Cir. 1977). Nevertheless, before it can approve a settlement

proposal, the Court must be satisfied that the settlement is fair, reasonable, and adequate. *In Re General Motors, supra,* at 1122; *In Re Clark Oil & Refining Corporation Antitrust Litigation,* 422 F. Supp. 503 (E.D. Wis. 1977). The proponents of the settlement bear the burden of persuasion on the issue of fairness. *In Re General Motors,* at 1126, n. 30; Manual for Complex Litigation §1.46 at 56 (1977 ed.) (Wright & Miller) (hereafter "Manual").

Among the factors which the Court should consider in judging the fairness of the proposal are the following:

"(1) '• • • the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';

"(2) '[T]he defendant's ability to pay';

"(3) '[T]he complexity, length and expense of further litigation';

"(4) '[T]he amount of opposition to the settlement';"

Manual, supra, at 56.

Professor Moore notes in addition the factors of:

"(1) • • •

"(2) Presence of collusion in reaching a settlement;

"(3) The reaction of members of the class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice §23.80[4] at 23-521 (2d ed. 1978).

The most important of the factors is number "(1)" from the Manual listed above; that is, the strength of the

plaintiffs' case on the merits as compared to what is offered in settlement. Manual at 56; 3B Moore's at 23-521; *In Re General Motors,* at 1132, n. 44.

The decision to accept or reject the settlement proposal is one within the discretion of the district court. *In Re Clark Oil, supra,* at 507; Manual at 57; *Ace Heating & Plumbing Company v. Crane Company,* 453 F.2d 30 (3d Cir. 1971). If the Court finds that the settlement is fair, it may accept it over the objection of some class members, *In Re General Motors, supra,* at 1134, and also over the objection of named class representatives. *In Re General Motors,* at 1128, n. 34 and 1134; *McDonald, supra,* at 426. The Court cannot, however, modify the terms of a settlement proposal; it can only accept or reject the proposal as presented to it. *In Re General Motors, supra,* at 1125, n. 24.

In the Manual it is recommended that the court follow a two-step procedure, which the Seventh Circuit has endorsed, *In Re General Motors, supra,* at 1133, in regard to a settlement proposal:

> "• • • The first step involves a preliminary determination as to whether notice of the proposed settlement should be given to members of the class and a hearing scheduled at which evidence in support of and in opposition to the proposed settlement will be received. Unless the judge is preliminarily satisfied that the proposed settlement is within the range of possible approval, there is no point in proceeding with notice and a hearing.
>
> • • •
>
> "Such a preliminary hearing is not, of course, a definative [sic] proceeding on the fairness of the proposed settlement • • • [I]t is simply a determination that there is, in effect, 'probable cause' to

submit the proposal to members of the class and to hold a full scale hearing on its fairness at which all interested parties will have an opportunity to be heard after which a formal finding of fairness will be made." Manual at 53-55.

Assuming that a finding of probable cause is made and notice is given to members of the class:

> "At the hearing itself, every effort should be made not only to hear all interested parties desiring to be heard, but to adduce all information necessary to enable the judge intelligently to rule on whether the proposed settlement is 'fair, reasonable, and adequate.' * * *" Manual at 57.

In this case, the Court on Decemebr 22, 1980, held a pre-fairness hearing at which counsel for the parties stated to the Court their reasons for supporting the settlement.

During the hearing the Court heard statements from counsel and heard testimony from seven persons opposed in various degrees to the settlement and who appeared in response to the notice of the agreement previously published and sent out to members of the plaintiff class.

At the conclusion of the hearing on December 22, 1980, the Court took the settlement proposal under advisement. For the reasons set forth in Part III below, the Court approves the agreement as being fair, adequate, reasonable, and in the best interests of the plaintiff class members.

III. *The Settlement Agreement*

In reaching its decision to approve the settlement agreement, the Court has considered the strength of the plaintiffs' case on the merits as compared to what is offered in settlement, the complexity, length and expense of fur-

ther litigation, the present stage of the proceedings and the amount of discovery completed, the amount of opposition to the settlement agreement and the reaction of members of the class to it, the possibility of the presence of collusion between opposing counsel, and the opinion of counsel on the agreement. The Court has also considered the reasonableness of the attorneys' fees which will be paid to plaintiffs' counsel under the agreement. The factor of defendants' ability to pay is not relevant to this case.

The complexity, length, and expense of future litigation is a factor which weighs in favor of approval of the settlement. This case has been in progress for five years, and during this time the cases of *United States v. International Brotherhood of Teamsters*, 431 U.S. 324 (1977), and *E.E.O.C. v. United Air Lines*, 560 F.2d 224 (7th Cir. 1977), have been decided. Although counsel are fully aware of the issues raised by the case and the proof available, the issue of whether a challenged seniority system is "bona fide" within the meaning of Title VII is still complex, and it arises in an area of the law which is still in the process of development. In the event the settlement proposal was not approved, this case could take years to try at great expense, since each individual plaintiff would have to prove his or her case of employment discrimination on the basis of race. On the other side of the ledger, in the event the settlement proposal is approved, several settling defendants will be dismissed from this action, thereby reducing the length, complexity, and expense of the legal action against the nonsettling defendants.

Thus, length, complexity and expense of future litigation are factors favoring approval of the consent decree.

The stage that the proceedings have reached is also a relevant factor inasmuch as it enables the Court and counsel to compare fully the resolution of the case with the strength of the plaintiff's case on its merits. As stated above, this is the most significant of the factors which a court should consider. *In Re General Motors, supra,* at 1132, n. 44.

In evaluating the strength of the plaintiffs' case on its merits, the Court places much weight on the statements of both plaintiffs' counsel, Jonathan Wallas, and defendant Ladish's counsel, David Jarvis, that the plaintiffs faced several contingencies including:

1. The recent Supreme Court decision in *United States v. Interational Brotherhood of Teamsters,* 431 U.S. 324 (1977). In *Teamsters,* the Supreme Court concluded that a seniority system whose operation served to freeze the status quo of prior discriminatory employment practices would be legally valid under §703(h) of Title VII if it were a bona fide seniority system within the meaning of that section. Id. at 353-54. When this action was filed, the *bona fide* seniority system defense was not a defense that was available to the defendants. Both plaintiffs' and defendants' counsel agree that the *Teamsters* decision has changed their perspective of this case and has increased the plaintiffs' burden.

2. The scope of the Wisconsin Fair Employment Act. The issue of whether the Wisconsin Fair Employment Act, §111.31 et seq., Wis. Stats., which is designed to end discrimination and the effects of discrimination based on race in Wisconsin, applies to seniority systems which allegedly perpetuate racial discrimination and perhaps affords the defendants no defense that the seniority system

is bona fide is a significant unknown under Wisconsin law.

3. Proving each individual plaintiff's case. The defendants argue that none of the plaintiffs has any Title VII claim because of the 300-day timeliness limitation. While a §1981 claim has a longer statute of limitations, the plaintiffs' burden of proof is higher because discriminatory motive or intent must be shown. *Mescall v. Burrus,* 603 F.2d 1266 (7th Cir. 1979).

To find that the solution that is offered in the settlement agreement is fair, reasonable, and adequate, the Court must evalute such solution. The proposed consent decree provides in part as follows:

"IV. SENIORITY RELIEF

"Consistent with their goals of affirmative action, the settling parties agree to the following seniority relief. Within fifteen (15) days of the date of the filing of this Decree, Ladish shall mail or hand deliver to each class member then employed by Ladish at its Cudahy facilities a copy of the Transfer Designation Form, a copy of which is attached hereto as Exhibit C. Class members shall be required to return a signed Transfer Designation Form within forty-five (45) days of receipt of said form.

"Class members who indicate they do not desire to transfer or who do not return their forms in forty-five (45) days shall lose any rights to preferential transfer pursuant to this Decree.

"Class members who currently are members of a bargaining unit who do indicate a desire to transfer to a given job or department shall be given the following opportunities:

"(a) Upon receipt of all Transfer Designation Forms the Company shall make a separate list of class members desiring to transfer into jobs within the jurisdiction of each of the labor unions representing employees at Ladish. That is, a list of all class members desiring to transfer to jobs within Local 494 shall be made, a list of all class members desiring to transfer to jobs within Local 125 shall be made; and so forth. These lists of class members shall have class members ranked in order of continuous Company hire date seniority and shall be given to the defendant unions and counsel for the plaintiffs, and shall be generally accessible to class members in the Company's personnel office.

"(b) As vacancies in entry level jobs occur which the Company has determined to fill from outside the bargaining unit (and the Company agrees to so fill all such vacancies unless bona fide business reasons dictate otherwise), qualified class members shall be allowed to transfer accordnig to the lists prepared in Paragraph IV(a) to the jobs or departments they have requested in order of their Company hire date seniority. Such transfers shall be in preference to all other transfer requests or to new hires.

"(c) Upon transfer to a new job or department pursuant to the terms of this Decree, class members will have ninety (90) days from the effective date of transfer in which to transfer back to their former job, department and/or classification with full accrued departmental and/or classification seniority by filling out and signing a written retransfer request. Once a class member transfers back to his former job, he loses all rights under Paragraph IV of this Decree.

"(d) Upon transfer to a job under this paragraph, class members who are now members of a bargaining unit shall maintain bargaining unit, departmental and/or classification seniority computed as of their most recent continuous date of hire with the Company. Such seniority shall be thereafter utilized in the new department according to the pertinent collective bargaining agreement.

"(e) Transferring class members will be red-circled in the jobs to which they transfer and will receive the average straight time hourly earnings from the immediately preceding quarter in the jobs from which they transferred with future increases until they obtain a job of higher rate or voluntarily refuse to bid on or request transfer to a higher paying job for which their seniority and qualifications would qualify them.

"An opportunity will be given all class members to meet with counsel for the plaintiffs on Company premises after the entry of this Decree and before the Transfer Designation Forms are due in order that said counsel can answer any questions which class members may have about this paragraph.

"V. HIRING, ASSIGNMENT AND PROMOTION GOALS

"Defendant Ladish agrees to recruit and hire qualified employees without regard to race or color. Consistent with its collective bargaining agreements, Ladish further agrees to recruit, hire and assign qualified blacks for vacancies (including apprentice positions) throughout all of the Company's departments and in all bargaining units. The settling union defendants agree to cooperate with Ladish to ensure blacks are fairly hired

and assigned and are given equal opportunities with respect to all apprentice programs.

"Ladish is determined to demonstrate its commitment to equal employment opportunity by achieving and maintaining a work force the racial composition of which reasonably reflects the qualified employees and applicants available for such work in the Company's recruiting areas. In order to achieve this work force composition, Ladish is committed, through its promotion, training and development policies, to ensure that advancement is based upon individual merit and qualification, regardless of race or color.

"In order to ensure that its work force accurately reflects the race distribution of the labor force and to support the attainment of affirmative action goals, Ladish has adopted, pursuant to Executive Order 11246, hiring and promotion goals designed to obtain a work force which reflects the availability of minorities. Such goals, as may from time to time be modified, are hereby incorporated in this Decree and will be revised at least annually. A copy of the current goals are attached as Exhibit D. Copies of such goals and the corresponding progress reports will be provided to counsel for plaintiffs on an annual basis. In addition to the goals established under Executive Order 11246, and incorporated herein, the Company agrees to establish the following specific hiring and promotion goals:

"(a) Of the next twenty (20) vacancies in its entry level manufacturing supervisory jobs (including trainees), not less than four (4) bona fide offers of employment will be made to minorities;

"(b) Not less than two (2) of the next twenty (20) offers of employment for entry level professional jobs

will be made to minorities. Entry level professional jobs include accounting, data processing, engineers, and sales.

"(c) Of the next ten (10) job offers for electrical apprentices, not less than two (2) will be made to minorities.

"These offers of employment shall be bona fide and shall be on terms and conditions comparable to those contained in offers made to non-minorities.

"The above goals will be subject to revision for applicable periods beginning January 1, 1982, through December 31, 1985, in light of the Company's experience. Goals are not to be considered as rigid or inflexible quotas. Ladish will pursue these goals with good faith effort.

"In order to ascertain the interests of incumbent class members with respect to vacancies in supervisory, professional and management jobs, Ladish shall, within ninety (90) days of the date of this Decree, canvass all class members then actively employed by the Company and provide each class member with an opportunity to indicate in writing the supervisory, managerial, or professional positions each class member desires to obtain. The Company will, when vacancies arise, consider the results of the canvass and attempt to place qualified class members in the jobs in which they indicate interest. Class members shall be informed at the time of the canvass that if their desires subsequently change, they may so inform the personnel office in writing."

The Court is persuaded, in view of the affirmative action embodied in §§IV and V of the consent decree, that the settlement does address itself to the goal of remedying the settling defendants' allegedly past discriminatory employment practices.

The settlement agreement also provides that the EEO coordinator for Ladish's Cudahy facility shall be the officer responsible for implementation of this consent decree. In carrying out this function, the EEO coordinator will work in cooperation and be in regular consultation with a class committee to be designated by plaintiffs (initially, Wm. Wattleton, J. Robinson and Wilbert Evans) and with counsel for the parties in order that there may be agreement between the parties to this action as to the application and implementation of this decree; and further provides that on or before March 1, 1982, for the twelve-month period ending December 31, 1981, and thereafter for four years, Ladish shall file annual progress reports with plaintiffs' counsel. The Court is satisfied that actions which may not comport with the settlement agreement will be brought to the attention of the class committee, and that the committee will satisfactorily protect the interests of the plaintiffs under the settlement agreement.

The consent decree also provides for the payment by Ladish of $200,000 to be distributed as follows:

"Those class members whose names are set forth in Exhibit "A," all of whom have spent time, incurred personal expense, and risked a portion of plaintiffs' legal fees in order that this case could be brought, will each receive the sum of $1,130.00.

"The remaining class members whose names are set forth in Exhibit "B" will each receive the sum of $565.00."

The Court finds that the differing treatment of class members is justified because of the differing risks and roles taken by class members in relation to this action,

and finds that the payment of such a significant sum of money to be reasonable.

The consent decree also provides that counsel for plaintiffs shall receive from Ladish their attorneys' fees, costs, and expenses in an amount agreed upon by the plaintiffs and Ladish and approved by the Court, or if no approval is granted, an amount set by the Court. Such payment will result in the receipt by class members who incurred the cost of this action of over $40,000. This will not preclude plaintiffs from recovering additional fees, costs, and expenses from the nonsettling defendants.

Having compared the strength of the plaintiffs' case on the merits with the solution that is offered in the consent decree, the Court finds that the consent decree is fair, reasonable, and adequate to protect the plaintiffs' right to a remedy for the settling defendants' past allegedly discriminatory employment practices.

In addition to reviewing the merits of the plaintiffs' case as compared to what is offered in settlement, the Court in deciding whether or not to accept the settlement should examine the reaction of class members to the settlement and the opinion of competent counsel with regard to the settlement, and should consider the possibility of collusion between counsel in arriving at the terms of the settlement.

First, the Court is persuaded that there was no collusion among counsel. The history of the litigation is a good indication in itself of lack of collusion.

Based on its long exposure to thise case, the Court is well aware of counsels' competence, of the time and labor spent by them, of the magnitude and complexity

of this litigation, of the responsibility undertaken by them, of the work performed by them out of court in preparation for court proceedings, and of what they have achieved during this litigation.

Both of plaintiffs' counsel, Attorneys Wallas and Julian, and several of the defendants' counsel, have expressed themselves in favor of the settlement agreement. It is their opinion that the future course of conduct by the defendant Ladish will be much improved, and that the affirmative action plan will be complied with in good faith. The Court has a high opinion of all counsel who have participated in this litigation. Their judgment as to the merits of the settlement agreement therefore weighs heavily with the Court, particularly since the Court is convinced that agreement was not reached easily but rather was the result of long and difficult negotiations.

Finally, the Court must consider the reaction of members of the plaintiff class to the settlement agreement. Nine persons responded in writing in regard to the merits of the proposed consent decree. Of these responses, five were opposed to acceptance of the agreement. At the fairness hearing, seven persons told the Court their objections to the consent decree. For the most part, those persons opposed acceptance of the consent decree on the ground that the monetary portion of the decree was inadequate.

The opinions expressed were thoughtful and informative. They represent the opinion of only a small percentage of the 228 class members. As stated, the Court can only accept or reject the settlement agreement; it cannot modify the agreement and still require the parties to accept it. *In Re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106 at 1125, n. 24 (7th

Cir. 1979). Also, the Court's duty in reviewing a settlement agreement is not to conduct a trial on the merits but rather to consider whether or not the agreement is fair, adequate, and reasonable, even though the plaintiffs might have obtained more relief had they chosen to continue litigating rather than to settle. *In Re General Motors, supra,* at 1132, n. 44; *Patterson v. Stovall,* 528 F.2d 108, 112 (7th Cir. 1976); *McDonald v. Chicago Milwaukee Corporation,* 565 F.2d 416 (7th Cir. 1977).

After reviewing the proposed settlement agreement in light of all of the factors which should be considered, see Manual for Complex Litigation §1.46 at 56 (1977 ed.) (Wright & Miller); 3B Moore's Federal Practice §23.80[4] at 23-521 (2d ed. 1978), including the criticisms of certain class members, the Court is persuaded that the agreement is fair, reasonable, and adequate, and that it merits approval by the Court.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

IV. *Order*

For the foregoing reasons,

IT IS ORDERED that the motion of the plaintiffs and defendants for approval of the consent decree filed with the Court on December 22, 1980, is granted and the consent decree is approved.

IT IS FURTHER ORDERED that the defendants Ladish, Local 125, Local 494, and Local 500 are dismissed from this action.

IT IS FURTHER ORDERED that a court trial between the plaintiffs and Local 92, Lodge #140, Local

1509, and Local 1862 will commence on March 30, 1981, at 9:30 a.m.

Dated at Milwaukee, Wisconsin, this 13 day of February, 1981.

UNITED STATES DISTRICT COURT

By

/s/ John W. Reynolds
John W. Reynolds
Chief Judge

APPENDIX A

CONSENT DECREE

This action was instituted December 30, 1975. Plaintiffs and intervening-plaintiffs (hereinafter collectively referred to as plaintiffs) are present and former black employees of the defendant Ladish Co. (hereinafter referred to as "Ladish" or the "Company"). The defendants, in addition to Ladish, are the following labor organizations (hereinafter sometimes referred to as the "union defendants") which represent Ladish's employees: The International Federation of Professional and Technical Engineers, Local #92; The International Brotherhood of Firemen and Oilers, Local #125; The International Brotherhood of Electrical Workers, Local #494; Office and Professional Employees International Union, Local #85, (formerly Associated Unions of America, Local #500); The International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140; The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #1509; and The International Association of Machinists and Aerospace Workers, Local #1862.

The plaintiffs alleged in their complaint and in subsequent pleadings that the defendants followed and were still following discriminatory employment practices based on race at Ladish's facilities located in Cudahy, Wisconsin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (hereinafter referred to as "Title VII") and the Civil Rights Act of 1866, 42 U.S.C. §1981 (hereinafter referred to as "§1981"). Plaintiffs also alleged that Local #1862 had violated the duty of fairly representing its black members imposed by 29 U.S.C. §§151 *et seq.* Plaintiffs have alleged from the outset that this case is properly a class action.

The defendants have denied the material allegations of the complaint and expressly deny any violation of Title VII, §1981, 29 U.S.C. §§151 *et seq.* or any other equal employment law, regulation or order, and do not, by consenting to the entry of this Decree, admit any liability whatsoever. However, to avoid the expense, inconvenience and distraction of prolonged litigation, to demonstrate good faith and to put to rest all controversies and all claims whether arising under State of Federal law, which have been or might be asserted by any member of the class arising from the matters alleged in the pleadings, the plaintiffs, Ladish, Local #92, Local #125, Local #494, Local #85, and Local #1862 (hereinafter the "settling parties") have concluded that it is in the best interest of the settling parties to settle his action in the manner and on the terms set forth in this Decree.

This Decree does not settle any pending claims between plaintiffs and the union defendants Lodge #140 and Local #1509. Plaintiffs are free to continue with their claims against Lodge #140 and Local #1509 and said defendants are not parties to this Decree.

This Decree is being issued with the consent of the settling parties and does not constitute a finding or adjudication of any discriminatory act or practice on the part of the settling defendants.

Therefore, the Court, upon due consideration of the record herein and being fully advised in the premises, concludes that the Court has jurisdiction of the parties and of the subject matter of this action and further ORDERS, ADJUDGES AND DECREES that:

I. CLASS REPRESENTATION

On February 12, 1980, this Court certified a class in this proceeding and defined the class as follows:

> . . . For the purpose of determining . . . whether the seniority system maintained by the defendants in the above-entitled action is a "bona fide seniority system" within the meaning of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), this action is hereby certified as a class action on behalf of all blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969.

The settling parties have reached agreement with respect to issues going beyond the "bona fide" nature of the seniority system. Therefore, the class of affected employees who are represented by the plaintiffs in this proceeding consists, for the purposes of this Consent Decree, of all blacks who both:

(a) were hired by Ladish Co. at Ladish's Cudahy, Wisconsin facilities prior to January 22, 1968

for jobs within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862; and

(b) were employed by Ladish in bargaining unit jobs as of December 30, 1969.

A list of all class members who fall within the definition set forth above is set forth in Exhibits A and B attached hereto and incorporated herein.

This action shall be maintained as a class action under Fed. R. Civ. P. 23(b)(2). The definition of the class given above is one agreed upon by the settling parties solely for the purposes of this Decree.

II. SETTLEMENT SCOPE

This Consent Decree settles in full all issues raised against the settling defendants or encompased by the facts pleaded in this action as to the settling defendants whether the issues be viewed under State or Federal law. The settling defendants' undertakings and commitments in this Decree constitute settlement in full of all claims against said settling defendants made by plaintffs or class members of unlawful discrimination in recruitment, hiring, seniority, training, assignment, transfer, promotion, job classification, evaluation, discipline, termination, pay, benefits and other terms and conditions of employment, known or unknown, and for damages, back pay, benefits, injunctive, declaratory or other relief for unlawful discrimination, past or present, up to and including the date on which notice of this proposed settlement is last published or mailed to the class (hereinafter "notice date").

III. NONDISCRIMINATION

The settling defendants, their officers, agents and employees shall continue to take positive action to ensure conformance with the requirements and objectives set forth in Title VII of the Civil Rights Act of 1964 and the Wisconsin Fair Employment Act, as amended. This obligation includes and requires special emphasis on the following:

> Hiring, placement, upgrading, transfer or demotion; recruitment, advertising or solicitation for employment; rates of pay or other forms of compensation; selection for training; and termination.

Ladish shall hire and promote individuals qualified and trainable for positions by virtue of education, training, experience and personal qualifications without regard to race or color.

IV. SENIORITY RELIEF

Consistent with their goals of affirmative action, the settling parties agree to the following seniority relief. Within fifteen (15) days of the date of the filing of this Decree, Ladish shall mail or hand deliver to each class member then employed by Ladish at its Cudahy facilities a copy of the Transfer Designation Form, a copy of which is attached hereto as Exhibit C. Class members shall be required to return a signed Transfer Designation Form within forty-five (45) days of receipt of said form.

Class members who indicate they do not desire to transfer or who do not return their forms in forty-five (45) days shall lose any rights to preferential transfer pursuant to this Decree.

Class members who currently are members of a bargaining unit who do indicate a desire to transfer to a given job or department shall be given the following opportunities:

(a) Upon receipt of all Transfer Designation Forms the Company shall make a separate list of class members desiring to transfer into jobs within the jurisdiction of each of the labor unions representing employees as Ladish. That is, a list of all class members desiring to transfer to jobs within Local 494 shall be made, a list of all class members desiring to transfer to jobs within Local 125 shall be made; and so forth. These lists of class members shall have class members ranked in order of continuous Company hire date seniority and shall be given to the defendant unions and counsel for the plaintiffs, and shall be generally accessible to class members in the Company's personnel office.

(b) As vacancies in entry level jobs occur which the Company has determined to fill from outside the bargaining unit (and the Company agrees to so fill all such vacancies unless bona fide business reasons dictate otherwise), qualified class members shall be allowed to transfer according to the lists prepared in Paragraph IV(a) to the jobs or departments they have requested in order of their Company hire date seniority. Such transfers shall be in preference to all other transfer requests or to new hires.

(c) Upon transfer to a new job or department pursuant to the terms of this Decree, class members

will have ninety (90) days from the effective date of transfer in which to transfer back to their former job, department and/or classification with full accrued departmental and/or classification seniority by filling out and signing a written retransfer request. Once a class member transfers back to his former job, he loses all rights under Paragraph IV of this Decree.

(d) Upon transfer to a job under this paragraph, class members who are now members of a bargaining unit shall maintain bargaining unit, departmental and/or classification seniority computed as of their most recent continuous date of hire with the Company. Such seniority shall be thereafter utilized in the new department according to the pertinent collective bargaining agreement.

(e) Transferring class members will be red-circled in the jobs to which they transfer and will receive the average straight time hourly earnings from the immediately preceding quarter in the jobs from which they transferred with future increases until they obtain a job of higher rate or voluntarily refuse to bid on or request transfer to a higher paying job for which their seniority and qualifications would qualify them.

An opportunity will be given all class members to meet with counsel for the plaintiffs on Company premises after the entry of this Decree and before the Transfer Designation Forms are due in order that said counsel can answer any questions which class members may have about this Paragraph.

V. HIRING, ASSIGNMENT AND PROMOTION GOALS

Defendant Ladish agrees to recruit and hire qualified employees without regard to race or color. Consistent with its collective bargaining agreements, Ladish further agrees to recruit, hire and assign qualified blacks for vacancies (including apprentice positions) throughout all of the Company's departments and in all bargaining units. The settling union defendants agree to cooperate with Ladish to ensure blacks are fairly hired and assigned and are given equal opportunities with respect to all apprentice programs.

Ladish is determined to demonstrate its commitment to equal employment opportunity by achieving and maintaining a work force the racial composition of which reasonably reflects the qualified employees and applicants available for such work in the Company's recruiting areas. In order to achieve this work force composition, Ladish is committed, through its promotion, training and development policies, to ensure that advancement is based upon individual merit and qualification, regardless of race or color.

In order to ensure that its work force accurately reflects the race distribution of the labor force and to support the attainment of affirmative goals, Ladish has adopted, pursuant to Executive Order 11246, hiring and promotion goals designed to obtain a work force which reflects the availability of minorities. Such goals, as may from time to time be modified, are hereby incorporated in this Decree and will be revised at least annually. A copy of the current goals are attached as Exhibit D. Copies of such goals and the corresponding progress reports will be pro-

vided to counsel for plaintiffs on an annual basis. In addition to the goals established under Executive Order 11246, and incorporated herein, the Company agrees to establish the following specific hiring and promotion goals:

(a) Of the next twenty (20) vacancies in its entry level manufacturing supervisory jobs (including trainees), not less than four (4) bona fide offers of employment will be made to minorities;

(b) Not less than two (2) of the next twenty (20) offers of employment for entry level professional jobs will be made to minorities. Entry level professional jobs include accounting, data processing, engineers, and sales.

(c) Of the next ten (10) job offers for electrical apprentices, not less than two (2) will be made to minorities.

These offers of employment shall be bona fide and shall be on terms and conditions comparable to those contained in offers made to non-minorities.

The above goals will be subject to revision for applicable periods beginning January 1, 1982, through December 31, 1985, in light of the Company's experience. Goals are not to be considered as rigid or inflexible quotas. Ladish will pursue these goals with good faith effort.

In order to ascertain the interests of incumbent class members with respect to vacancies in supervisory, professional and management jobs, Ladish shall, within ninety (90) days of the date of this Decree, canvass all class members then actively employed by the Company and provide each class member with an opportunity to indicate in writing the supervisory, managerial, or profes-

sional positions each class member desires to obtain. The Company will, when vacancies arise, consider the results of the canvass and attempt to place qualified class members in the jobs in which they indicate interest. Class members shall be informed at the time of the canvass that if their desires subsequently change, they may so inform the personnel office in writing.

VI. INCENTIVE PAY

In order to promote the implementation of this Decree and the attainment of the affirmative action employment goals set forth in Paragraph V herein, Ladish shall provide incentive payments to all class members. Ladish hereby agrees to pay a total of $200,000.00 to be distributed to the class on the basis set forth below.

Those class members whose names are set forth in Exhibit A, all of whom have spent time, incurred personal expense and who have risked a portion of plaintiffs' legal fees in order that this case could be brought, shall each receive the sum of $.....

The remaining class members whose names are set forth in Exhibit B shall receive the sum of $.....

Within thirty (30) days after the final approval by the Court of this Decree, checks in the amounts specified above will be mailed by certified mail to all class members (or to the estate of all deceased class members).

The method used for the administration of the incentive pay program is simply a mechanical means agreed upon by the settling parties solely for the purpose of this Decree. Plaintiffs do not waive their rights to seek monetary or other relief from the non-settling defendants.

VII. NOTICE TO CLASS

Appropriate notice to class members of the proposed settlement has been accomplished as previously ordered by the Court. Class members have, therefore, been given an opportunity to object to the proposed Decree.

VIII. REPORTS

(a) The EEO Coordinator for the Company's Cudahy facility shall be the officer responsible for implementation of this Decree. The responsibility of the official selected shall include ensuring that rights and procedures provided in this Decree are implemented. In carrying out this function, the official shall work in cooperation and regular consultation with the class committee to be hereafter designated by plaintiffs and with counsel for the parties in order that there may be agreement between the parties to this action as to the application and implementation of this Decree. In addition, the official and counsel for the parties shall seek as far as possible to resolve without resort to the Court any problems which may arise in effectuating this Decree. The official shall supervise the preparation of the reports described in Paragraph VIII(b) below.

(b) On or before March 1, 1982, for the twelve-month period ending December 31, 1981, and thereafter for four years, Ladish shall file annual progress reports with plaintiffs' counsel, which will include the following information:

(1) A list detailing by race new hires in all jobs and the jobs, departments and labor union jurisdiction where applicable, to which new hires are initially assigned;

(2) A list showing all transfer and retransfers or other job movements pursuant to Paragraph IV of this Decree indicating the name of the class member involved and the type of movement made and a list of all class members who move to all nonbargaining unit jobs.

(3) A summary of recruiting efforts made by the Company which demonstrates its efforts to meet the goals described herein.

IX. ATTORNEYS' FEES

Counsel for plaintiffs shall receive from Ladish Co. attorneys' fees, costs and expenses in an amount agreed upon by the plaintiffs and Ladish Co. and approved by the Court, or if no approval is granted, an amount set by the Court. Such amount shall not preclude plaintiffs from recovering additional fees, costs and expenses from the nonsettling defendants.

X. STATUS OF LAWSUIT

The last report under Paragraph VIII of this Decree will be due March 1, 1986. Unless a motion is filed within ninety (90) days of the receipt of said final report requesting that the Court consider additional orders for compliance, this case will be dismissed on August 1, 1986.

XI. ORDER APPROVING CONSENT DECREE

The Court, having fully examined the provisions of this Decree finds that the entire settlement is reasonable, just and in accordance with the Congressional purpose in enacting Title VII and §1981 and with the Federal Rules of Civil Procedure. Further, the Court finds that the

rights and interests of all employees under both State and Federal law are fully protected by this Decree. Therefore, the Court approves this settlement and compromise of this class action.

IT IS SO ORDERED, this 13th day of February, 1981.

/s/ John W. Reynolds
United States District Judge

CONSENTED TO:
(Signature of all counsel)

.....

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM WATTLETON, et al., ORDER

Plaintiffs, Civil Action

v. No. 75C746

THE LADISH COMPANY, et al.,

Defendants.

Presently before the court is the plaintiff's motion brought pursuant to Rule 59 of the Federal Rules of Civil Procedure for clarification of this court's decision and order of February 13, 1981. Plaintiffs want the court to order not only that the consent decree is approved but that the consenting parties are bound by it. It think this is superfluous, but I will order it if it makes the parties happy.

Since the Bebruary 13, 1981, order,

Local 92, International Federation of Professional and Technical Engineers, AFL-CIO has informed the court that it has ratified the consent decree. Local 92 will, therefore, be bound by the consent decree and will be dismissed from this action.

IT IS THEREFORE ORDERED that the defendants Ladish Company; International Federation of Professional and Technical Engineers, Local 92; International Brotherhood of Firemen and Oilers, Local 125; International Brotherhood of Electrical Workers, Local 494; and Associated Unions of America, Local 500 are bound by the terms of the consent decree approved by this court on February 13, 1981, and signed by this court on March 27, 1981, and they are dismissed from this action.

Thus, the remaining parties, i.e., the International Die Sinker Conference and Milwaukee Die Sinkers, Lodge 140; the International Brotherhood of Boiler Makers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 1509; and the International Association of Machinists and Aerospace Workers, Local 1862 will go to trial on March 30, 1981.

Dated at Milwaukee, Wisconsin, this 27th day of March, 1981.

UNITED STATES DISTRICT COURT

By /s/ John W. Reynolds,

Chief Judge

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM WATTLETON, et al., ORDER

Plaintiffs, Civil Action

v. No. 75C746

THE LADISH COMPANY, et al.,

Defendants.

The consent decree between the plaintiffs and Ladish Company, approved by this court on February 13, 1981, provides in paragraph IX that Ladish Company will pay to counsel for the plaintiffs attorneys' fees, costs, and expenses in an amount agreed upon by the plaintiffs and Ladish Company and approved by the Court or, if no approval is granted, an amount set by the Court. The plaintiffs and Ladish Company have agreed that an award of

attorneys' fees, costs, and expenses in the amount of $75,000 is appropriate. Currently before the court is the plaintiffs' motion for approval of the amount agreed upon by the plaintiffs and Ladish Company. For the reasons that follow, the Court approves the agreement reached between the plaintiffs and Ladish Company regarding an award of attorneys' fees, costs, and expenses.

Documentation and affidavits submitted along with the plaintiffs' motion for approval of attorneys' fees reveals that as of March 15, 1981, the plaintiffs' law firm of Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., has invested in excess of 825 hours of attorney time in this litigation and has incurred costs and expenses in excess of $17,000. As of the same date,

the plaintiffs' other law firm of Julian and Olson, S.C., has invested in excess of 270 hours of attorney time in this litigation and has incurred costs and expenses in excess of $2,000. After subtracting the costs and expenses incurred by the plaintiffs from the total award, $56,000 remains for payment of attorneys' fees. This figure, when divided by the total hours of attorney time invested by the plaintiffs in this litigation, results in an hourly award of approximately $51. Because of the complexities involved in this civil rights litigation, I find that the request for attorneys' fees is fair and reasonable. Accordingly, the Court approves the agreement reached between the plaintiffs and Ladish Company that

Ladish Company pay to counsel for the plaintiffs attorneys' fees, costs, and expenses in the total amount of $75,000.

IT IS SO ORDERED.

Dated at Milwaukee, Wisconsin, this 7th day of April, 1981.

UNITED STATES DISTRICT COURT

By: /s/ John W. Reynolds

Chief Judge

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM WATTLETON, et al., DECISION

v. Plaintiffs, Civil Action

THE LADISH COMPANY, et al., No. 75C746

Defendants.

Also Found At 520 F.Supp. 1329

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is a civil rights action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Civil Rights Act of 1866, 42 U.S.C. § 1981, as well as a breach of fair representation action brought pursuant to 29 U.S.C. §§ 151, et seq. This court has jurisdiction under 28 U.S.C. § 1343(3), 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. §§ 2201 and 2202.

On March 30, 1981, the trial of the above-entitled action commenced. The trial lasted seven days. At the conclusion of trial on April 7, 1981, the Court rendered its decision from the bench and announced that the reasons for the Court's ruling would be set forth in a decision which would follow at a later date. Following an introduction necessary for a full understanding of this case, the Court shall make its findings of fact and state its conclusions of law thereon.

I. INTRODUCTION

In 1974, plaintiff Johnnie Robinson went to the Milwaukee office of the Equal Employment Opportunity Commission ("EEOC") with the intent to file a charge of employment discrimination against his employer, The Ladish Company ("Ladish"). EEOC personnel, however, advised Robinson that in order to secure proper redress, he should obtain the names of every union that represented employees at Ladish. In accordance with that advice, on June 5, 1974, Robinson filed a charge of employment discrimination with the EEOC, naming as respondents Ladish and the following seven unions: (1) International Federation of Professional and Technical Engineers, Local #92 ("IFPTE"); (2) International Brotherhood of Firemen and Oilers, Local #125 ("IBFO"); (3) International Brotherhood of Electrical Workers, Local #494 ("IBEW"); (4) Associated Unions of America, Local #500 ("AUA"); (5) International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 ("Die Sinkers"); (6) International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local #1509 ("Blacksmiths"); and (7) International Association of Machinists and Aerospace Workers, District No. 10, Local #1862 ("Machinists"). Robinson alleged:

> "Prior to 1968, Ladish Company maintained a segregated hiring policy wherein all Black workers were hired into Union contracted Machinist jobs, which were the lowest paying jobs available at the Company. Such a policy has led to a current and continuing system of discrimination in seniority, wages and promotion. As a Black employee, I and others similarly situated, have been discriminated against as a result of Ladish's past policies of seg-

regated hiring and resultant seniority and salary system. The affiliated Unions have contributed to this discrimination via the Union Contracts." (Plaintiffs' Exhibit 1)

On October 3, 1975, Robinson was notified by letter from the EEOC of his right to bring suit in the appropriate United States District Court within ninety days of receipt of the letter. He and ten other black employees of Ladish commenced this action on December 29, 1975, on behalf of themselves and all others similarly situated. Eight of the other named plaintiffs had filed EEOC charges on the dates set forth below:

Name	*EEOC Charge Filed*
William Wattleton	July 28, 1975
Willard Wilson	August 30, 1975
Daniel Brown	August 30, 1975
Robert Spearmon	August 30, 1975
Clarence Suggs	August 30, 1975
Ruben Madison	September 20, 1975
John Armstrong	October 30, 1975
Clayton Jacobs	October 31, 1975

On March 31, 1977, these eight plaintiffs were notified by letters from the EEOC of their rights to bring suit, and an amended complaint was filed on May 3, 1977.[1]

Several other black Ladish employees had filed EEOC charges. Their names and the dates on which they had filed their EEOC charges are set forth below:

Name	*EEOC Charge Filed*
Steve T. Tillman	April 15, 1976
William Bell	April 15, 1976
Charles Jones	April 20, 1976
Tommie L. Ballet	July 1, 1976
Willie Queary	July 1, 1976
Charles C. Graves	July 1, 1976
Henry E. Graves	July 1, 1976

On March 31, 1977, these seven persons were notified by letter from the EEOC of their rights to bring suit. A complaint in intervention was filed on their behalf on May 3, 1977.

This court on June 13, 1977, granted the plaintiffs' motion to file an amended complaint and the plaintiffs-intervenors' motion to intervene. (Hereinafter the plaintiffs and the plaintiffs-intervenors will be referred to as "plaintiffs.")

On February 12, 1980, the Court granted in part the plaintiffs' motion for class certification and certified the class of plaintiffs as follows:

> "• • • [F]or the purpose of determining the first claim, i.e., whether the seniority system maintained by the defendants • • • is a 'bona fide seniority system' within the meaning of § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), this action is hereby certified as a class action on behalf of all blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969." *Wattleton v. Ladish,* No. 75-C-746 (E.D. Wis., Feb. 12, 1980, at page 7).

On the same date the Court granted the plaintiffs' motion to sever the issue of liability from the issue of damages and remedies in the event liability was established. *Id.*

In a status conference held on November , 1980, the plaintiffs and certain defendants informed the Court that they were prepared to settle all issues that remained in this action. Accordingly the Court determined that a

hearing on the proposed settlement should be held on December 22, 1980. In furtherance thereof, on November 7, 1980, the court issued a notice of hearing to consider and approve the proposed consent decree and an order implementing the hearing to consider the same and providing for notice of the hearing. The notice of hearing and proposed consent decree were mailed to the class members on November 19, 1980.

On December 22, 1980, the Court conducted a lengthy hearing for the purpose of hearing approvals or objections to the proposed consent decree. In an opinion dated February 13, 1981, after reviewing the proposed consent decree in light of many factors, this Court approved the consent decree. See *Wattleton v. Ladish Co.*, No. 75-C-746 (E.D. Wis., Feb. 13, 1981). The effect of the consent decree was to settle all issues in this action between the plaintiffs and Ladish, IFPTE, IBFO, IBEW, and AUA, and to set down for trial this action between the plaintiffs and the Die Sinkers, Blacksmiths, and Machinists.

Left remaining for trial on March 30, 1981, were the plaintiffs' contentions that (1) Ladish, with the full knowledge, cooperation, and complicity of the Machinists, Blacksmiths, and Die Sinkers, maintained a policy and practice of hiring blacks for and assigning them to the dirtiest, lowest paying, and least desirable jobs within the jurisdiction of the Machinists;[2] (2) Ladish, with the acquiescence of the Machinists, Blacksmiths, and Die Sinkers, maintained a policy of refusing to promote and transfer blacks to better paying and more desirable jobs within the jurisdictions of the Machinists, Blacksmiths, and Die Sinkers;[3] (3) the Machinists, Blacksmiths, and Die Sinkers, by reason of seniority systems within their

respective collective bargaining agreements, perpetuated the initial discrimination against blacks because their seniority systems prevented blacks from transferring to better paying and more desirable jobs within their respective jurisdictions without full carryover seniority; and (4) the Machinists' bargaining unit has failed to properly and fairly represent its black members.

II. FINDINGS OF FACT

The following constitute the Court's findings of fact pursuant to Rule 52 of the Federal Rules of Civil Procedure. These findings will be grouped into introductory matters and according to the issues raised at trial by the parties.

A. *Introductory Matters: The Parties, The Communities, and The Workforce at Ladish*

1. Plaintiffs are all black citizens and residents of the United States as well as present or former employees of Ladish and present or former members of the Machinists. All plaintiffs were hired by Ladish prior to January 1, 1968, and were initially placed into jobs under the jurisdiction of the Machinists.

2. Ladish, with one of its principal facilities in Cudahy, Wisconsin, is a major employer in the Milwaukee area and is an employer within the meaning of 42 U.S.C. § 2000e(b); it currently employs in excess of 5,000 employees, 4,000 of whom are under the jurisdiction of bargaining units. Ladish makes custom fittings and forgings for its customers but makes no products of its own. Among its customers is the United States, with government contracts for jet engine parts and other military parts constituting approximately 50 per cent of Ladish's business.

This action involves only Ladish's Cudahy facility. Ladish was one of the settling defendants.

3. The Die Sinkers represent all employees of Ladish who are engaged, directly or indirectly, in producing and maintaining all dies, parts of dies, and models which are used in the production and completion of forgings. The crafts of the journeymen Die Sinkers are highly skilled, perhaps the most highly skilled at Ladish, and are achieved through extensive apprenticeship programs that are federal and state indentured and approved. Entry into one of these apprenticeship programs is accomplished through bidding from the bargaining unit employees at such times when Ladish determines the existence of openings in the programs and posts these openings for bids.

4. The Blacksmiths represent approximately 1,000 of the 4,000 bargaining unit employees at Ladish. Blacksmiths, generally speaking, are engaged, directly or indirectly, in forming and shaping raw materials into forgings. Blacksmith jobs in the forge shop, particularly those involving work around hot furnaces and drop hammers, require physical strength and an ability to withstand adverse working conditions.

5. The Machinists represent approximately 2,000 of the 4,000 bargaining unit employees at Ladish. Machinists, generally speaking, take forgings and then machine and inspect them, and finally ship finished products. As recited above, all plaintiffs and the class that they represent were hired by Ladish for jobs under the jurisdiction of the Machinists and were employed by Ladish as of December 30, 1969.

6. Cudahy, Wisconsin, is an area populated primarily by whites. Few blacks, to the present time, have lived in Cudahy.

7. Few blacks lived in the Milwaukee area prior to World War II. After this war, blacks began to migrate northward and came to settle in the Milwaukee area. The black population in Milwaukee and the Milwaukee area has increased steadily and significantly since World War II. Unquestionably, blacks were generally limited to purchasing homes and renting apartments in certain areas of Milwaukee, and these living arrangements were generally substandard. In Milwaukee during the 1950's, there was evidence of racial discrimination in jobs, housing, schools, and everyday social contacts.

8. In 1973 and 1974, the Office of Federal Contract Compliance ("OFCC") conducted an audit of Ladish's Cudahy facility. This audit included an analysis of Ladish's then existing work force.[4] In response to requests of the OFCC, Ladish prepared a detailed analysis of its work force. Exhibit A, attached hereto, is an analysis of the Cudahy hourly employees hired from August 1948 to December 1967, and a distribution of those hirings by bargaining units. Exhibit B, attached hereto, is an analysis of those minorities hired by Ladish prior to January 1, 1968, and still employed by Ladish in 1974, and a distribution of those hirings by bargaining unit.

9. A review of these Exhibits A and B and the trial testimony reveal the following. Apparently no blacks were hired by Ladish prior to 1948. Between 1948 and 1968, Ladish hired 190 blacks who were still employed as of the OFCC audit in 1974. All of these blacks hired between 1948 and 1968 and still employed in 1974 were initially placed into jobs under the jurisdiction of the Machinists. None of these blacks were initially placed into jobs under the jurisdiction of any other bargaining unit at Ladish, including the Blacksmiths and the Die

Sinkers. During the same time period, 1948-1968, Ladish hired and initially placed 119 nonblack employees into jobs under the jurisdiction of the Die Sinkers; 375 nonblack employees into jobs under the jurisdiction of the Blacksmiths; 30 nonblack employees into jobs under the jurisdiction of the IBEW; 4 nonblack employees into jobs under the jurisdiction of the IBFO; 118 nonblack employees into jobs under the jurisdiction of the IFPTE; 154 nonblack employees into jobs under the jurisdiction of AUA; as well as 311 nonblack employees into nonunion jobs. In addition to the 190 blacks hired and initially placed into jobs under the jurisdiction of the Machinists during the period 1948-1968, there were 1,074 nonblacks similarly hired and initially placed into Machinists' jobs.

10. A closer review of the exhibits reveals that on seventy dates throughout the 1948-1968 time period, nonblack employees were hired and initially placed into jobs under the jurisdiction of bargaining units other than the Machinists, while on the same dates 81 black employees were hired and initially placed into jobs under the jurisdiction of the Machinists.

11. Finally, these exhibits reveal that no blacks were initially placed into jobs under the jurisdiction of the Blacksmiths until after January 1, 1968, and that no blacks were initially placed into jobs under the jurisdiction of the Die Sinkers prior to December 1967. Thus, beginning in January 1968, Ladish began hiring, assigning, and transferring blacks into jobs under the jurisdiction of bargaining units other than the Machinists.

B. *The Minimal Qualifications Required by Ladish from Applicants Seeking Employment*

12. The minimum requirements for the great majority of jobs at Ladish are simple literacy and good health. Although Ladish has sought out skilled craftsmen to fill certain of the journeymen jobs and apprenticable trades at Ladish, most employees have been hired for entry level jobs with little, if any, job skills; consequently, most employees have learned their skills while on the job.

13. Ladish maintains apprenticeship programs for certain jobs under the jurisdiction of the Machinists and the Die Sinkers. There are no apprenticeship programs under the jurisdiction of the Blacksmiths, although there are learnership programs.

14. Ladish has traditionally maintained a policy of giving special favorable consideration to the relatives of incumbent employees. Indeed, employees have been encouraged to recommend relatives or friends to Ladish to fill job vacancies.

15. The absence of placements of blacks into jobs under the jurisdiction of the Blacksmiths and the Die Sinkers between 1948-1968 is not explained by a comparison of employee qualifications. Most white employees placed into jobs under the jurisdiction of the Blacksmiths during the period 1948 to 1968 had neither a distinguishing education nor job skills which would have qualified them especially for work with the Blacksmiths. Based on the testimony, the Court finds that most employees hired at Ladish were unskilled with respect to the jobs they were placed into and that they learned the skills related to their jobs while working on the job. The Court further finds that there is no evidence in the record that the blacks

hired between 1948 and 1968 were less skilled, less qualified, or less apt to learn job skills than the whites hired during this same time period.

16. The right to determine qualifications, hire, place initially within a bargaining unit, and promote have been and remain the sole responsibility and exclusive right of Ladish. In particular, neither the Machinists, nor the Blacksmiths, nor the Die Sinkers, since certification as a bargaining unit, has ever had control over or participation in the hiring, placement, or promotion of employees at Ladish. The Court further finds that with one exception for the Ladish-Blacksmiths' collective bargaining agreements effective August 22, 1949, the right to transfer has been and remains the sole responsibility and exclusive right of Ladish. In particular, neither the Machinists nor the Die Sinkers, since certification as a bargaining unit, has had control over or participation in the transfer of employees at Ladish.

C. *The Details and Conclusions of the OFCC Audit of Ladish's Workforce*

17. As noted above, the OFCC conducted an audit of Ladish's workforce in July 1973. This audit eventually focused on whether the then existing workforce had an "affected class." An affected class consists of those employees who by virtue of past hiring discrimination and by the nature of the limited seniority carryover provisions of the pertinent collective bargaining agreements were in a position that they continued to suffer the present effects of past discriminatory acts. Based on the audit, the OFCC concluded in September 1973 that an affected class existed at Ladish, consisting of all blacks who were hired by Ladish prior to January 22, 1968, and who were placed

by Ladish into jobs under the jurisdiction of the Machinists. Ladish has never agreed with the OFCC's determination that an affected class exists at Ladish.

18. Also in September 1973, the OFCC made a proposal to Ladish regarding relief for the affected class and directed that Ladish take certain actions regarding that proposal. In particular, the OFCC proposal allowed members of the affected class to transfer from jobs under the jurisdiction of the Machinists into jobs under the jurisdiction of other bargaining units at Ladish with full carryover seniority for all purposes.

19. Pursuant to OFCC directions, two members of Ladish's personnel and labor relations staff, Richard Junas and Harry Lau, conducted individual interviews with most of the members of the affected class in January and February 1974. These individual members were asked hypothetically whether they would be interested in transferring with full carryover seniority for all purposes to a job under the jurisdiction of a bargaining unit other than the Machinists. The results of the individual interviews were then compiled. Approximately one-half of those members of the affected class who were interviewed by Junas and Lau indicated their desire to transfer to a job under the jurisdiction of a bargaining unit other than the Machinists.

20. Subsequently, in March of 1974, Ladish sent a memorandum to each of the bargaining units concerning the OFCC proposal of relief for the affected class. In the memorandum Ladish, inter alia, (1) indicated the number of members of the affected class who had expressed an interest in transferring to jobs under the jurisdiction of that bargaining unit, (2) expressed its willingness to allow members of the affected class to transfer to jobs

under the jurisdiction of that bargaining unit with full carryover seniority for all purposes, and (3) requested that members of the affected class who had expressed an interest in transferring to jobs under the jurisdiction of that bargaining unit be allowed to do so. For example, in its memorandum to officials of the Blacksmiths, Ladish indicated that sixty-nine members of the affected class had, during the interviews described above, expressed an interest in transferring to jobs under the jurisdiction of the Blacksmiths, indicated its willingness to allow these transfers to the Blacksmiths, with full carryover seniority for all purposes, and requested that the Blacksmiths go along with such transfers.

21. The testimony at trial indicated that the transfers were to take place only when vacancies became available within the Blacksmiths. Members of the affected class were to be given an opportunity to transfer to those vacancies and to remain in their new jobs for a period of ninety days. In the event that members of the affected class decided to remain in their new jobs within the Blacksmiths after the ninety-day trial period, they were to be given full plantwide seniority for all purposes. In the event that members of the affected class decided to return to their old jobs within the Machinists after the ninety-day trial period, they were to be allowed to do so without loss of any seniority.

22. After their receipt of the Ladish memorandum and proposal concerning the affected class, the various bargaining units met on several occasions to discuss that proposal. The evidence at trial revealed that on one occasion, Mr. Pollard from the Washington headquarters of the AFL-CIO came to Milwaukee to meet with representatives of AFL-CIO affiliated bargaining units.

Representatives from the Machinists and the Blacksmiths, inter alia, attended this meeting. Representatives from the Die Sinkers attended the meeting even though the Die Sinkers are not affiliated with the AFL-CIO. The evidence at trial further revealed that although Mr. Pollard and the bargaining unit representatives had discussed the Ladish proposal, neither a response nor a counterproposal was made by any bargaining unit at this meeting. Likewise, the evidence at trial revealed that except for a suggestion made by the Machinists that will be discussed below, neither a response nor a counterproposal was made on any of the several other occasions on which representatives of the various bargaining units had met to discuss the Ladish proposal.

23. At some point during the time that the bargaining units were discussing the Ladish proposal, the Machinists suggested to Ladish that the latter institute full plant-wide seniority for all purposes for all employees in all bargaining units. Ladish, however, was not receptive to the Machinists' suggestion for the reason that it believed that bargaining unit seniority was imperative to the successful operation of its manufacturing processes. This is still Ladish's belief.

24. Subsequently, each of the bargaining units at Ladish indicated to Ladish, either formally or informally, that it was not willing to allow the members of the affected class to transfer from jobs under the jurisdiction of the Machinists to jobs under its jurisdiction with full carryover seniority.

25. For unknown reasons, nothing ever came of the OFCC determination that an affected class existed at Ladish or the OFCC's proposal for relief for affected class members. Apparently these matters became buried

in the National Office of the OFCC, with the result that Ladish never had to implement any of the OFCC's recommendations.

D. *The Details As To Hiring and Job Assignment*

26. In addition to presenting statistical evidence, the plaintiffs and class members offered live testimony regarding their efforts to obtain jobs under the jurisdiction of the Blacksmiths.[8] Clayton Jacobs filled out a written application with Ladish in approximately September 1951, and specifically requested a job in the forge shop, a job under the jurisdiction of the Blacksmiths. Despite having prior forge shop experience while working for Oxen Drop Forge Company in Chicago, Illinois, Jacobs was not hired by Ladish. After being told by a black employee at Ladish that blacks were not allowed to work in the forge shop, Jacobs returned to Ladish and filled out a second written application with Ladish in approximately October 1951. This time Jacobs did not specifically request a job in the forge shop, and he was hired and assigned to a grinding job under the jurisdiction of the Machinists. A review of the August 7, 1974, Blacksmiths' seniority roster reveals that several nonblack individuals were hired by Ladish during this same time period for jobs under the jurisdiction of the Blacksmiths as follows:

Name	*Date of Hire*
Tony Bertino	9- 5-51
Lee Aasterud	9-18-51
William Stcharsky	9-19-51
Leo Woyak	9-25-51
Robert Wiggins	9-27-51
Joseph Fleischman	10- 2-51

Domihic Court	10- 2-51
Ivan Knisber	10- 8-51
Leonard Hernandez	10-17-51

27. William Wattleton filled out a written application with Ladish in approximately May of 1955. Prior to completing his application, Wattleton had reviewed the large company bulletin board containing a list of jobs currently available at Ladish. Since it had appeared on the bulletin board that there were jobs available in the forge shop, Wattleton specifically requested a job within the forge shop. Wattleton was not granted his specific request but was hired and assigned to a grinding job under the jurisdiction of the Machinists. A review of the above-mentioned Blacksmiths' seniority list reveals that several nonblack individuals were hired by Ladish during this same approximate time for jobs under the jurisdiction of the Blacksmiths as follows:

Name	*Date of Hire*
Jose Aboytes	5- 2-55
Emil Elm	5- 2-55
James Williams	5- 9-55
Earl Stahl	5-23-55
Michael Lazor	5-26-55
Henry Karpinski	5-26-55
John Schuldt	5-26-55
Earl Pomasl	5-26-55
Lester Fritschler	5-26-55

28. At trial, the Blacksmiths introduced into evidence a 1981 seniority roster for the forge shop. This seniority roster is not persuasive evidence that no employees were hired by Ladish for jobs within the jurisdiction of the Blacksmiths from 1955 to 1965, inclusive, since this seniority roster simply lists only those employees who

were still actively employed at Ladish as of 1981 for a single department under the jurisdiction of the Blacksmiths.

29. A compliance report provided by Ladish to Westinghouse Electric Company in April 1963 shows that Ladish's officials, managers, professional and technical employees, sales workers, and office and clerical staff were virtually all white. More specifically, the racial composition in those categories was as follows:

Occupation	*Whites*	*Negroes*	*Others*
Officials and Managers	625	0	0
Professional Employees	59	0	0
Technical Employees	89	0	1
Sales Workers	32	0	0
Office and Clerical	809	0	0

30. Having considered all the evidence, including (1) the statistical evidence relating to hiring and initial placement of employees into bargaining units during the period 1948 to 1968; (2) the evidence showing that on seventy dates throughout the period 1948 to 1968 blacks were hired and initially placed into jobs within the Machinists' bargaining unit while on the same date nonblacks were hired and initially placed into jobs within other bargaining units; (3) the details and conclusions of the OFCC audit of Ladish's workforce; (4) the total lack of evidence showing that blacks hired during the period 1948 to 1968 were less skilled, less qualified, or less apt to learn job skills as nonblacks hired during this same time period; (5) the hiring and placement of employees into nonbargaining unit jobs; and (6) the testimony of the plaintiffs regarding their efforts to obtain a job under the jurisdiction of the Blacksmiths, the Court concludes and so finds that blacks hired at Ladish during the period

1948 to 1968 were virtually limited to jobs under the jurisdiction of the Machinists as a matter of policy or practice by Ladish. This policy or practice is neither supported by the relative qualifications of black and white employees nor explained by any other business reason. The fact is that for a twenty-year period of time, virtually all blacks were placed into jobs under the jurisdiction of the Machinists and were not placed into jobs under the jurisdiction of other bargaining units, and the evidence is overwhelming that this discriminatory hiring and placement by Ladish was intentional.

31. Based on the evdence relating to hiring and job assignment, the Court finds that the Machinists have accepted into membership all persons who were hired and placed into their bargaining unit without regard to race or national origin.

32. Absent any evidence to the contrary, the Court finds that the Die Sinkers have accepted into membership all persons who were hired and placed into their bargaining unit without regard to race or national origin.

33. The testimony adduced at trial also revealed that blacks who were hired by Ladish beginning in 1948 and in increasing numbers beginning in the 1950's were generally assigned to jobs as grinders and truckers within the Machinists' bargaining unit. Although blacks have never constituted more than 10 per cent of the Machinists' bargaining unit workforce, approximately 70 per cent of the grinders were black. These jobs were in fact among the dirtiest, lowest paying, and least desirable under the jurisdiction of the Machinists. The Court is persuaded and so finds that Ladish did not maintain a policy and practice of hiring blacks just for these jobs.

Rather, the Court finds that the nonblacks as well as blacks have initially occupied unskilled entry level positions and that nonblacks as well as blacks have had the opportunity by use of a bidding system based solely on seniority to progress to more skilled, higher paying, and more desirable jobs. Understandably, if job skill is not a factor in hiring and assigning a new employee to a job, under the Machinists' internal departmental seniority system which preserves to those already having seniority rights the opportunity to bid and secure the better paying and more desirable jobs, only entry level jobs become available because of their undesirability and relatively low pay.

34. Having carefully considered all the evidence, including the theory of the plaintiffs' expert witness Herbert Hill that all blacks were hired and assigned to the Machinists' bargaining unit pursuant to a tacit agreement between Ladish and all the bargaining units, the Court concludes that the plaintiffs have failed to produce any evidence that the Machinists, Blacksmiths, or Die Sinkers in any way had cooperated with or had acted as accomplices to the Ladish policy and practice of hiring blacks for and assigning them to jobs almost exclusively under the jurisdiction of the Machinists.

E. *The Details As To Employee Transfers*

At trial, the Court heard considerable evidence relating to (1) the operation of the challenged seniority systems as to employee transfers, (2) Ladish's policy for allowing transfers from a job under the jurisdiction of one bargaining unit to a job under the jurisdiction of another bargaining unit, and (3) both Ladish's willingness to allow transfers and individual blacksmith's feelings toward

transfers of plaintiffs into jobs under the Blacksmiths' bargaining unit.

35. Supported by evidence that will be summarized infra, the Court finds that the challenged seniority systems generally provided that employees who transferred from a job under the jurisdiction of one bargaining unit to a job under the jurisdiction of another bargaining unit had to forfeit their accrued seniority for purposes of layoff, recall, and job bidding. In terms used by the plaintiffs, the challenged seniority systems required an individual to commit "seniority suicide" upon transfer to a job under the jurisdiction of another bargaining unit.

36. Based on the testimony of John Foley, Vice President of Industrial and Public Relations for Ladish, the Court finds that Ladish maintained a policy for allowing employee transfers from a job under the jurisdiction of one bargaining unit to a job under the jurisdiction of another bargaining unit throughout the period 1948-1968. The Court further finds that Ladish maintained throughout the period 1948-1968 a policy for giving preference or consideration to employees seeking a transfer to a vacancy over individuals seeking hire to a vacancy. This preference or consideration was determined on the basis of plantwide seniority and ability to perform the vacant job. Finally, the Court finds that there was a proper procedure to follow when seeking to transfer to a job under the jurisdiction of another bargaining unit throughout the period 1948-1968. That procedure required the employee to contact Ladish's personnel department and to file some sort of transfer application form with the personnel department. Information regarding transfer procedures at Ladish passed primarily by word of mouth until after 1974.

37. Several plaintiffs testified regarding Ladish's willingness to allow transfers and individual blacksmith's feelings toward transfers of the plaintiffs to jobs under the jurisdiction of the Blacksmiths. Herman Banks was one of the plaintiffs who testified. Banks was hired as a grinder in the Machinists' bargaining unit on February 21, 1952. In May or June of 1953, Banks noticed that a job had been posted on the bulletin board for a helper on the number 10 hammer. This job was and is a job under the jurisdiction of the Blacksmiths. Banks, who wanted to transfer to that job, signed and filed a job bid for it. No incumbent blacksmith apparently bid on that job, so that Banks was the bidder with the most plantwide seniority for the job. His bid was rejected, however, because he was a Machinist bidding on a job under the jurisdiction of the Blacksmiths. Banks testified that subsequently he was taken by a company official and a Blacksmith steward to see George Bitters who was then Ladish's director of labor relations and personnel. Banks claimed that he was denied a transfer to the Blacksmiths' bargaining unit because of some papers he was shown, i.e., an agreement between Ladish and the Blacksmiths to keep blacks out of jobs in the Blacksmiths' bargaining unit, and because of some talk about his transfer causing a strike in the Blacksmiths' bargaining unit. After this experience, Banks never repeated his attempt to transfer into a job under the jurisdiction of the Blacksmiths.

38. On cross-examination, Banks could remember neither the name of the blacksmith steward who had accompanied him to Bitter's office nor any details concerning the alleged agreement between Ladish and the Blacksmiths. Moreover, Banks admitted that he had never attempted to follow Ladish's procedure governing trans-

fers. The Court is persuaded that Banks' testimony regarding an agreement between Ladish and the Blacksmiths is sketchy, but I am persuaded that Bank's experience left him with the impression that he could not transfer into the Blacksmiths' Union, and that the Union and the company intended that he get that impression.

39. Abraham Leflore was hired as a grinder on February 2, 1952. Leflore heard some talk that the income potential of jobs in the Blacksmiths' bargaining unit was greater than his own job as a grinder. In late 1952 or early 1953, he noticed that a job under the jurisdiction of the Blacksmiths had been posted on the bulletin board. Leflore bid on this job. His bid was torn up by a Ladish official, however. Thereafter, Leflore expressed his interest in transferring to a higher paying job under the jurisdiction of the Blacksmiths, though he never was allowed to effect such a transfer. The reason, Leflore testified, was his belief that Ladish wanted to avoid the strike by the Blacksmiths' bargaining unit that would have occurred in the event a black was allowed to transfer into the Blacksmiths' bargaining unit.

40. On cross-examination, Leflore admitted that he had never attempted to follow Ladish's procedure governing transfer. I am persuaded that the company intended to and did discourage him from attempting to transfer into the Blacksmiths' Union and that the Union acquiesced in this.

41. Wardell Wilson was hired into the Machinists' bargaining unit on January 30, 1956. He had a locker close to where a number of blacksmiths dressed. At trial, Wilson testified that he had talked with Ray Nauman, a blacksmith. about the way in which he could obtain a

job under the Blacksmiths' bargaining unit. Nauman replied that blacks would not be allowed into a job within the Blacksmiths' bargaining unit.

42. On cross-examination, Wilson admitted that he never had formally attempted to transfer from his job in the Machinists' bargaining unit to a job within the Blacksmiths' bargaining unit.

43. William Wattleton testified that while he was working as an inspector in the forge department, a job under the jurisdiction of the Machinists, he had inquired about the way in which he could transfer to a job under the jurisdiction of the Blacksmiths. He was told by a member of the Blacksmiths' bargaining unit that blacks would not be allowed into a job within the Blacksmiths' bargaining unit.

44. On cross-examination, Wattleton admitted that he never had formally attempted to transfer from his job as inspector in the Machinists' bargaining unit to a job within the Blacksmiths' bargaining unit.

45. Frank Seng, chairman of the Blacksmiths' bargaining committee and Ladish employee since 1950, testified that many of the blacksmiths had come to Milwaukee from the South and had not shared his views and feelings of no prejudice against blacks.

46. Having considered all the evidence, including (1) the statistical evidence relating to transfers of employees during the period 1948-1968, (2) the total lack of evidence showing that blacks hired during the period 1948 to 1968 were less skilled, less qualified, or less apt to learn job skills as nonblacks hired during this same period of time, and (3) the testimony of the plaintiffs regarding

their efforts to transfer to a job under the jurisdiction of the Blacksmiths, the Court concludes and so finds that blacks hired at Ladish during the period 1948 to 1968 were virtually limited to jobs under the jurisdiction of the Machinists as a matter of policy or practice by Ladish. This policy or practice is neither supported by the relative qualifications of black and white employees nor explained by any other business reason. The fact is that for a twenty-year period of time blacks were not allowed into jobs under the jurisdiction of other bargaining units, and the evidence is overwhelming that this policy or practice of discriminatory transfer by Ladish was intentional.

47. The Blacksmiths contend that the plaintiffs have failed to establish the involvement of a single official of the Blacksmiths in decisions not to transfer the plaintiffs into jobs within their bargaining unit. In support of their contention, the Blacksmiths argued that the right to transfer employees has been and is the sole responsibility and exclusive right of Ladish and that, in any event, not a single plaintiff had followed Ladish's procedure governing transfers. For reasons that the Court will shortly offer, the Court rejects the Blacksmiths' contention.

48. The uncontroverted evidence is that between 1949 and January 27, 1955, Ladish allowed a number of nonblacks to transfer from jobs under the jurisdiction of the Machinists to jobs under the jurisdiction of the Blacksmiths; while the uncontroverted evidence is also that the Ladish-Blacksmiths' collective bargaining agreement, effective August 22, 1949 to September 30, 1951, and thereafter, gave the Blacksmiths virtual veto power

over inter-bargaining unit transfers, i.e., over transfers from another bargaining unit into jobs under the jurisdiction of the Blacksmiths.

49. After both judging the credibility of Leflore, Wilson, Wattleton, and Banks and reviewing the record, the Court is convinced that no plaintiff transferred to a job under the jurisdiction of the Blacksmiths for reasons that the Blacksmiths made it clear to Ladish and also made it clear to the plaintiffs that they did not want and would not accept blacks into their bargaining unit. Such a determination is, by its nature, subjective; but determining whether invidious discriminatory purpose was a motivating factor requires a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

F. *Whether the Challenged Seniority Systems Freeze the Status Quo of Prior Discriminatory Practices and Carry That Discrimination Into the Present*

50. The OFCC determination, the testimony of the plaintiffs, and the operation of the challenged seniority systems are persuasive evidence that the seniority systems embodied in the collective bargaining agreements between Ladish and the three defendant bargaining units have perpetuated the effects of prior discriminatory practices and will carry the effects of that discrimination into the present.

G. *Whether Having the Challenged Seniority Systems in Separate Bargaining Units is Rational*

and in Conformance with Industry Practice and The National Labor Relations Act

At trial, the Court heard testimony from Professor Herbert Hill, John Foley, Richard Junas, and Joseph George on the issue of whether the challenged seniority systems were rational and in conformance with industry practice and the National Labor Relations Act.

51. Foley testified that on at least three or four occasions the Machinists had attempted to eliminate their internal departmental seniority system. Ladish, however, rejected these attempts because in its opinion departmental seniority is beneficial and advantageous to the smooth operation of Ladish's manufacturing processes. Foley and Junas testified that in the event all bargaining units had proposed full carryover seniority for all purposes for all bargaining unit members in response to OFCC's 1973-1974 proposal regarding relief for the affected class, Ladish would have rejected this proposal because in its opinion full carryover seniority is dysfunctional and disruptive to the smooth operation of Ladish's manufacturing processes.

52. Based on the testimony of Foley and Junas, the Court finds that the Machinists' internal departmental seniority is rational, and further finds that the prohibition of carryover seniority between multiple bargaining units in a single plant is rational.

53. Professor Hill and George testified concerning their considerable knowledge of seniority systems, and George testified concerning his considerable experience in the negotiation of collective bargaining agreements. Having considered their testimony, the Court finds that the prohibition of carryover seniority between multiple

bargaining units in a single plant, which is the situation at Ladish, is both nearly a universal industry practice and consistent with National Labor Relations Board precedents. The Court also finds that the Machinists' internal departmental seniority system is in accordance with widespread industry practice.

54. As noted above, Professor Hill testified extensively on the history of the International Association of Machinists and Aerospace Workers. He compared the Machinists' unit at Ladish with the International Association of Machinists and Aerospace Workers, noting that the Machinists' bargaining unit at Ladish is both an industrial and craft bargaining unit while the International union has traditionally been a craft union The Court is not persuaded and does not find that this comparison shows that industrial jobs were added to the Machinists' bargaining unit in order to keep blacks in jobs under the jurisdiction of the Machinists. Instead, the Court finds that the addition of industrial jobs to those jobs already under the jurisdiction of the Machinists was rational and completely in accordance with National Labor Relations Board precedents.

H. *Whether the Seniority System of the Machinists, Blacksmiths, or Die Sinkers Had Their Genesis in Racial Discrimination*

Since other courts have scrutinized the events leading up to the challenged seniority practices, including but not limited to the past and contemporaneous actions of relevant institutions, see, e.g., *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977); *Scarlett v. Seaboard Coastline R. R. Co.*, 21 E.P.D. ¶7678, at 12,728 (S.D. Ga. 1979), the Court listened

with interest to a long history of racial discrimination within the International Association of Machinists and Aerospace Workers and the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers, and Helpers of America.

55. Based on the extensive research and uncontroverted testimony of the plaintiffs' expert, Professor Herbert Hill, the Court is persuaded and so finds (1) that the International Association of Machinists and Aerospace Workers had a long history of policies and practices which resulted in the exclusion of blacks from membership in the International union until approximately 1948; (2) that the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers, and Helpers of America had a long history of policies and practices which resulted first in the exclusion of blacks from membership in the International union and later in the segregation of blacks into black auxiliaries until approximately 1947; and (3) that there is no evidence that the International Die Sinkers Conference had policies or practices of racial discrimination.

56. Based on a thorough and careful consideration of the entire record, the Court finds that the plaintiffs failed to produce any evidence that either the Machinists or the Blacksmiths, the local auxiliary unions that are defendants to this action, followed or maintained discriminatory policies or practices similar to those of the International unions.

57. Between 1927 and approximately 1943, there were no collective bargaining units representing employees at Ladish.

58. The first collective bargaining agreement at Ladish was a collective bargaining agreement between Ladish

and the Die Sinkers This original agreement, effective from April 21, 1943, included a seniority system which provided, inter alia, for bargaining unit seniority,[6] classification seniority, and for work sharing down to twenty-four hours per week before layoffs would begin.

59. The first collective bargaining agreement between Ladish and the Machinists was effective from June 6, 1945 to May 31, 1946. This original agreement included a seniority system which provided, inter alia, for bargaining unit seniority and departmental seniority. The agreement further provided that an employee leaving the Machinists' bargaining unit would immediately lose all his accrued seniority within the Machinists' bargaining unit upon transfer to a job under the jurisdiction of another bargaining unit, even if that employee would later return to a job within the Machinists' bargaining unit.

60. As recited above, the original Ladish-Machinists' collective bargaining agreement provided for departmental seniority. That is, if an employee in one department in the Machinists' bargaining unit transferred to another department in the Machinists' bargaining unit, then for a one-year period that employee would forfeit his accrued bargaining unit seniority for purposes of layoff, recall, and job bidding.[7]

61. The first collective bargaining agreement between Ladish and the Blacksmiths was effective from March 23, 1945 to August 31, 1946. This original labor contract included a seniority system which provided, inter alia, for bargaining unit and departmental seniority. In particular, employees who moved either from a job under the jurisdiction of another bargaining unit to one department of the Blacksmiths to a job in another de-

partment of the Blacksmiths forfeited their seniority for purposes of layoff, recall, and job bidding.

62. Based on the facts that the first Ladish-Die Sinkers' collective bargaining agreement was effective from April 21, 1943, and that the first blacks were apparently hired at Ladish in 1948, the Court is persuaded and so finds that the challenged seniority system in the Ladish-Die Sinkers' collective bargaining agreement did not have its genesis in racial discrimination.

63. Based on the facts that the first Ladish-Machinists' collective bargaining agreement was effective from June 6, 1945 to May 31, 1946, and that the first blacks were apparently hired at Ladish in 1948, the Court finds that the challenged seniority system in the Ladish-Machinists' collective bargaining agreement did not have its genesis in racial discrimination.

64. Based on the facts that the first Ladish-Blacksmiths' collective bargaining agreement was effective from March 23, 1945 to August 31, 1946, and that the first blacks were apparently hired at Ladish in 1948, the Court finds that the challenged seniority system in this particular Ladish-Blacksmiths' collective bargaining agreement did not have its genesis in racial discrimination.

I. *Whether the Challenged Seniority Systems Have Been Negotiated and Maintained Free From Any Illegal Purpose*

65. The Die Sinkers' seniority provisions have been carried forward, essentially unchanged, through every collective bargaining agreement between Ladish and the Die Sinkers to the present.

66. The present Machinists' seniority provisions differ somewhat from those contained in the original Ladish-Machinists' collective bargaining agreement. The current Ladish-Machinists' agreement does not contain the one-year waiting period for recoupment of accrued seniority upon transfer to a new department within the Machinists' bargaining unit and does contain a clause that allows an employee leaving the Machinists' bargaining unit and taking a job under the jurisdiction of another bargaining unit the opportunity to return to the Machinists' bargaining unit within ninety days without loss of all his accrued seniority within the Machinists' bargaining unit. The Machinists' departmental seniority provisions and seniority provisions which prevent employees in other bargaining units from transferring to a job under the jurisdiction of the Machinists with full carryover seniority for all purposes have been carried forward, essentially unchanged, through every collective bargaining agreement between Ladish and the Machinists to the present.

67. The present Blacksmiths' seniority provisions are essentially the same as those contained in the original Ladish-Blacksmiths' collective bargaining agreement. These seniority provisions, however, have not been carried forward unchanged through every collective bargaining agreement between Ladish and the Blacksmiths to the present. Bargaining unit seniority was carried forward through two more collective bargaining agreements between Ladish and the Blacksmiths. In the Ladish-Blacksmiths' collective bargaining agreement, effective August 22, 1949 to September 30, 1951, however, a significant change was made to the bargaining unit seniority provisions of the Ladish-Blacksmiths' labor contract; it

was changed such that total plantwide seniority would carry over to jobs under the jurisdiction of the Blacksmiths for purposes of layoff. Specifically, employees who transferred to jobs under the jurisdiction of the Blacksmiths carried with them whatever seniority they had previously accrued for purposes of layoff and recall. This change, allowing carryover seniority, remained in effect from August 22, 1949 to January 27, 1955, as will be noted below. In the Ladish-Blacksmiths' collective bargaining agreement effective September 20, 1954 to September 24, 1956, the provision that total plantwide seniority would carry over to jobs under the jurisdiction of the Blacksmiths was deleted. Despite this deletion, those persons who had transferred from August 22, 1949 to January 27, 1955, to a job under the jurisdiction of the Blacksmiths were still allowed to utilize their total plantwide seniority for layoff and recall purposes. In 1972, the Ladish-Blacksmiths' collective bargaining agreement was amended to clearly set forth the special seniority rights of those individuals who had transferred to jobs under the jurisdiction of the Blacksmiths between 1949 and January 27, 1955.

68. The original Ladish-Blacksmiths' collective bargaining agreement has been subject to other changes. The original Ladish-Blacksmiths' collective bargaining agreement, effective March 23, 1945 to August 31, 1946, contained a nondiscrimination clause which read as follows:

> "Neither the Company nor the Union shall discriminate against any employee because of his membership or nonmembership in the Union, or his race, color, creed, or national origin." (Article I, ¶ 4.)

Identical language was carried forward through two more collective bargaining agreements between Ladish and the

Blacksmiths. In the Ladish-Blacksmiths' collective bargaining agreement effective August 22, 1949 to September 30, 1951, the clause prohibiting discrimination on the basis of race, color, creed, or national origin was eliminated. A nondiscrimination clause in the Ladish-Blacksmiths' collective bargaining agreement was not again added until after the passage of Title VII in 1964.

69. The original collective bargaining agreement between Ladish and the Blacksmiths, effective from March 23, 1945 to August 31, 1946, and the next two collective bargaining agreements thereafter contained no provisions regarding inter-bargaining unit transfers. In the Ladish-Blacksmiths' collective bargaining agreement effective August 22, 1949 to September 30, 1951, a significant provision regarding inter-bargaining unit transfers was added:

> "Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred." (Article IV, Transfers and Layoffs, ¶ 8.)

Subsequent Ladish-Blacksmiths' collective bargaining agreements retained this inter-bargaining unit transfer provision, including the Ladish-Blacksmiths' agreement effective January 1, 1951 to June 30, 1952; the Ladish-Blacksmiths' agreement effective September 1952 to September 1954; the Ladish-Blacksmiths' agreement effective September 20, 1954 to September 24, 1958; the Ladish-Blacksmiths' agreement effective November 1955 to September 1958; and the Ladish-Blacksmiths' agreement effective 1958 to 1961.

70. A review of the history of collective bargaining agreements between Ladish and the Die Sinkers, Machin-

ists, and Blacksmiths reveals that the challenged seniority systems provided, with one important exception, that employees who transferred from a job under the jurisdiction of one bargaining unit to a job under the jurisdiction of another bargaining unit had to forfeit their accrued seniority for purposes of layoff, recall, and job bidding.

71. The uncontroverted evidence is that:

(a) The exception to the general rule set forth above is the Ladish-Blacksmiths' collective bargaining agreements effective from August 22, 1949 to September 20, 1954. These collective bargaining agreements changed the seniority provisions governing the Blacksmiths bargaining unit such that full plantwide seniority would prevail in jobs under the jurisdiction of the Blacksmiths for purposes of layoff and recall.

(b) The Ladish-Blacksmiths' collective bargaining agreement, effective August 22, 1949 to September 30, 1951, and thereafter, gave the Blacksmiths virtual veto over inter-bargaining unit transfers. That is, in contrast to Ladish's sole responsibility and exclusive right to transfer employees into jobs under the jurisdiction of the Die Sinkers and the Machinists, Ladish's ability to transfer employees into jobs under the jurisdiction of the Blacksmiths was subject to the Blacksmiths' approval of the transfer.

(c) Ladish allowed, and the Blacksmiths permitted, a number of nonblack employees to transfer from jobs under the jurisdiction of the Machinists to jobs under the jurisdiction of the Blacksmiths between 1949 and January 27, 1955, with full carryover seniority for purposes of layoff and recall. In contrast, no black employees were

afforded transfers to jobs under the jurisdiction of the Blacksmiths between 1945 and January 27, 1955.

(d) The Ladish-Blacksmiths' collective bargaining agreement, effective September 20, 1954 to September 24, 1956, deleted the provision permitting transferring employees to carry with them their full plantwide seniority for purposes of layoff and recall.

(e) The Ladish-Blacksmiths' collective bargaining agreement, effective August 22, 1949 to September 30, 1951, and for several collective bargaining agreements thereafter, eliminated the nondiscrimination provisions of earlier Ladish-Blacksmiths' collective bargaining agreements.

72. At trial, both Professor Hill and Joseph George testified concerning their knowledge of seniority systems in the Milwaukee area and throughout the United States. Aside from the Ladish-Blacksmiths' collective bargaining agreements, neither Hill nor George was aware of any other collective bargaining agreement in which the seniority system went from one of allowing the carryover of full plantwide seniority for purposes of layoff and recall to one of prohibiting the carryover of full plantwide seniority for such purposes.

73. The three changes in the Ladish-Blacksmiths' collective bargaining agreement, effective August 22, 1949 to September 30, 1951, coincided with the time Ladish first began to hire blacks in 1948. The change in the Ladish-Blacksmiths' collective bargaining agreement, effective September 20, 1954 to September 24, 1956, coincided with times of a steady increase in the hiring of blacks at Ladish. As noted above, between 1948 and 1968 Ladish hired 190 blacks who were still actively employed

at Ladish as of 1974. While only 2 of these 190 were hired by Ladish in 1948 and none were hired in 1949, 3 blacks were hired in 1950, 24 blacks were hired in 1951, 12 blacks were hired in 1952, and 15 blacks were hired in 1953. While no blacks were hired in 1954, 26 blacks were hired in 1955 and 45 blacks were hired in 1956.

74. These changes in the Ladish-Blacksmiths' collective bargaining agreement, when considered in light of the evidence heard by the Court relating to individual blacksmith's feelings toward transfer of the plaintiffs into jobs under the jurisdiction of the Blacksmiths and the evidence showing that nonblacks were allowed to transfer with full carryover seniority to jobs under the jurisdiction of the Blacksmiths while during the same time period blacks were discouraged from doing so, are persuasive evidence that the Blacksmiths' seniority system has not been negotiated and maintained free from any illegal purpose. The Court specifically finds that the plaintiffs have come forward with sufficient credible evidence to support their claim that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths. The Court has considered, but has rejected, the Blacksmiths' contention that the sole purpose of the deletion of carryover seniority in the Ladish-Blacksmiths' collective bargaining agreement in 1954 was to reflect the fact that other bargaining units had failed to reciprocate by bargaining a similar system of carryover seniority.

75. There is simply no evidence in the record to support the theory that the Machinists', the Blacksmiths' or the Die Sinkers' collective bargaining agreements were

negotiated pursuant to an agreement or conspiracy among the bargaining units that the Machinists take in all the blacks. Nor is there any evidence in the record to support the plaintiffs' contention that the Machinists', Blacksmiths', or Die Sinkers' refusal in 1974 to allow the members of the affected class to transfer from jobs under the jurisdiction of the Machinists to jobs under their respective jurisdiction with full carryover seniority or refusal to modify their respective seniority system to allow carryover seniority was motivated by their animosity towards the plaintiffs.

76. Absent any evidence to the contrary, the Court finds that the plaintiffs have not established that the seniority system which existed in the collective bargaining agreements between Ladish and the Die Sinkers was maintained with a purpose and intent to discriminate against them.

77. Absent any evidence to the contrary, the Court finds that the plaintiffs have not established that the seniority system which existed in the collective bargaining agreements between Ladish and the Machinists was maintained with a purpose and intent to discriminate against them.

J. *Whether the Challenged Seniority Systems Operate to Discourage All Employees Equally from Transferring Between Seniority Units*

78. The plaintiffs did not contend at trial that the challenged seniority systems involved disparate treatment. Rather, the gist of their action was that the challenged seniority systems, although neutral on their face, have and were intended to have a disparate impact on

black workers. Despite the plaintiffs' suggestion that the internal departmental seniority system of the Machinists is a failure to fairly represent the plaintiffs, the law is clear that an internal departmental seniority system is to be evaluated using the same criteria as used to evaluate multi-union seniority systems at a single plant. See *EEOC v. Chesapeake and Ohio Railway Co.*, 17 F.E.P. Cases 815 (4th Cir. 1978); *Swint v. Pullman-Standard*, 624 F.2d 310 (5th Cir. 1980).

79. Based on the evidence, the Court finds that both the Machinists' internal departmental seniority system and their bargaining unit seniority system are racially neutral and that both systems operate to affect similarly situated (without regard to race) employees similarly. That is, to the extent the internal departmental seniority system locks in or discourages employees from transferring, it does so for all employees; to the extent the bargaining unit seniority systems of other bargaining units lock in or discourage machinists from transferring, it does so for all machinists. And, to the extent the bargaining unit seniority system of the Machinists prohibits carryover seniority into its bargainng unit, it locks out or discourages equally all employees from transferring into the Machinists' bargaining unit.

80. Based on the evidence, the Court finds that the Die Sinkers' bargaining unit seniority system is facially neutral and operates to affect similarly situated (without regard to race) employees similarly. That is, to the extent the bargaining unit seniority systems of other bargaining units lock in or discourage die sinkers from transferring, it does so for all die sinkers; to the extent the bargaining unit seniority system of the Die Sinkers prohibits carryover seniority into its bargaining unit, it locks out or dis-

courages equally all employees from transferring into the Die Sinkers' bargaining unit.

81. Consistent with the Court's findings of fact regarding whether the Ladish-Blacksmiths' collective bargaining agreements were negotiated and maintained free from a purpose of intentionally discriminating against blacks, the Court finds, based on the evidence, that the seniority systems negotiated between Ladish and the Blacksmiths have and were intended to have a disparate impact on black workers at Ladish.

K. *Whether the Machinists Bargaining Unit Has Failed to Properly and Fairly Represent Its Black Members*

82. The Court has found that on at least three or four occasions, the Machinists have attempted to eliminate their internal departmental seniority system, but that on each occasion their attempt was rebuffed by Ladish. See finding of fact number 51.

83. The Court has found that the Machinists have proposed full carryover seniority for all members of its bargaining unit in response to Ladish's proposal of full carryover seniority for the OFCC-determined affected class. See finding of fact number 22.

84. The Machinists are restricted by law to negotiate with Ladish for seniority rights solely within the Machinists' bargaining unit. Subject to this legal restriction, the Machinists could not bargain with Ladish for a provision allowing its members full carryover seniority for all purposes upon transfer to a job under the jurisdiction of and subject to the seniority provisions of another bargaining unit.

85. At no time prior to the commencement of this action had there been any claim made by any of the plaintiffs that the Machinists did not properly or fairly represent its members.

86. Based on all the evidence adduced at trial, the Court finds that not one plaintiff stated that he was dissatisfied with the Machinists' representation in the negotiation of wages, hours, or conditions of employment or in the prosecution of grievances. The Court further finds that not one plaintiff stated that he had not enjoyed full membership in the Machinists or had not had the opportunity to fully participate in the Machinists' membership meetings or activities. Finally, the Court finds that several of the plaintiffs have occupied and currently occupy positions of trust and authority within the Machinists' bargaining unit.

87. Based on the findings of fact enumerated above, the Court concludes that the plaintiffs have failed to show that the Machinists' bargaining unit has failed to properly and fairly represent its black members.

III. CONCLUSIONS OF LAW

1. A violation of either Title VII or 42 U.S.C. §1981 requires an intentional discriminatory act; a disparate impact is not sufficient to establish such a violation. *Cannon v. The University of Chicago,* — F.2d — (No. 80-1763, slip op. at 9) (7th Cir., May 6, 1981) (Title VII); *Mescal v. Burrus,* 603 F.2d 1266, 1270 (7th Cir. 1979) (§1981).

2. The Court was convinced at trial and remains convinced that the plaintiffs have met their burden of establishing discriminatory hiring, placement, and transfer policies on the part of Ladish for the period 1948 to 1968,

carried over past the effective date of Title VII through the operation of the challenged seniority systems. No reasonable trier of fact could find otherwise. Convinced that the plaintiffs have met their burden set forth above, the Court must next consider the issue of whether the challenged seniority systems are immunized by §703(h) of Title VII.[8] See *Teamsters v. United States,* 431 U.S. 324, 352-353 (1977). In consideration of this issue, the burden of demonstrating that the challenged seniority systems are bona fide is on the unions. See *Swint v. Pullman-Standard,* 17 E.P.D. ¶8604, at 7098 (N.D. Ala. 1978), rev'd on other grounds, 624 F.2d 525 (5th Cir. 1980), cert. granted, 49 U.S.L.W. 3778 (April 21, 1981); *Griffin v. Copperweld Steel Co.,* 22 E.P.D. ¶30,637, at 14,413 (N.D. Ohio 1979); *Scarlett v. Seaboard Coastline R. R. Co.,* 21 E.P.D. ¶7678, at 12,728 (S.D. Ga. 1979); *Freeman v. Motor Convoy,* 20 E.P.D. ¶30,090, at 11,493 (N.D. Ga 1979); *Broadnax. v. Mo. Pacific R. R. Co.,* 20 E.P.D. ¶30,132, at 11,708 (E.D. Ark. 1978).

3. In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 353-354 (1977), the Court considered §703(h) and construed this section as providing "that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." As emphasized by the Supreme Court, however:

> "• • • §703(h) does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race • • •.' • • • " *Id.,* at 353.

See also *California Brewers Association v. Bryant,* 444 U.S. 598 (1980).

In determining whether the challenged seniority systems are bona fide under the teaching of Teamsters, this Court is both guided by the Teamsters' decision and relies upon a distillation of factors set forth by several cases interpreting the Teamsters' decision. Those guiding factors are:

(a) Whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(b) Whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

(c) Whether the seniority system had its genesis in racial discrimination; and

(d) Whether the system was negotiated and has been maintained free from any illegal purpose.

James v. Stockham Valves and Fittings Co., 559 F.2d 310, 350-353 (5th Cir. 1977). See also *Sears v. Atchison, Topeka and Santa Fe Railway Co.*, 25 F.E.P. Cases 337, 341 (10th Cir. 1981); *Swint v. Pullman-Standard*, 624 F.2d 525, 530 (5th Cir. 1980). The Court is mindful that these guiding factors are simply a mode of analysis for determining what is in reality the ultimate issue: whether "the totality of the circumstances" indicate that "there has been purposeful discrimination in connection with the establishment or continuation of a seniority system." *Swint*, supra, at 530; *James*, supra at 351.

4. Applying the above-stated authority to the facts found in this case, the Court was convinced at trial, and remains convinced, that as a matter of law the Machin-

ists and Die Sinkers have met their burden of demonstrating that there has been no purposeful discrimination in connection with the establishment or continuation of their respective seniority systems. That is, the seniority systems of both the Machinists and the Die Sinkers are bona fide within the meaning of § 703(h) of Title VII.

Following the same application of authority to the facts found in this case, the Court was convinced at trial, and remains convinced, that as a matter of law the Blacksmiths have not met their burden of demonstrating that there has been no purposeful discrimination in connection with the establishment or continuation of their seniority system. No reasonable trier of fact, in the Court's opinion could conclude otherwise.

In 1949, the Ladish-Blacksmiths' collective bargaining agreement was changed in three ways. First, the collective bargaining agreement was changed from one not allowing transfer to jobs under the jurisdiction of the Blacksmiths with full carryover seniority for purposes of layoff and recall to one allowing such transfers. Second, the collective bargaining agreement was changed from one not allowing the Blacksmiths virtual veto power with respect to any inter-bargaining unit transfers to one allowing such veto power. Third, the collective bargaining agreement was changed from on containing an antidiscrimination clause to one not containing such a clause. These three changes remained in effect from 1949 to January 27, 1955. The uncontroverted evidence is that from 1949 to 1955, a period of time during which blacks became a factor in the workforce at Ladish, a number of white employees in jobs under the jurisdiction of the Machinists transferred to jobs under the jurisdiction of the Blacksmiths, while no blacks were allowed to trans-

fer to jobs under the jurisdiction of the Blacksmiths despite their attempts and desires to do so. In 1955, the Ladish-Blacksmiths' collective bargaining agreement was changed to prohibit transfer to jobs under the jurisdiction of the Blacksmiths with full carryover seniority for purposes of layoff and recall. This change did not affect those nonblack employees who had transferred to jobs within the Blacksmiths' bargaining unit from 1949 to 1955. They retained the seniority they had previously carried with them into the Blacksmiths' bargaining unit and still exercise that seniority today. In the Court's opinion, these contractual changes negotiated by the Blacksmiths, when considered in conjunction with facts found respecting plaintiffs' testimony and with facts found regarding hiring, placement, and transfer policies on the part of Ladish, are persuasive evidence that the Blacksmiths' seniority system was not always negotiated and has not always been maintained free from a purpose, intent, and effect of discriminating against the plaintiffs. That is, the seniority system of the Blacksmiths is not bona fide within the meaning of § 703(h) of Title VII.

5. Having found that the Blacksmiths' seniority system was not always negotiated and has not always been maintained free from a purpose, intent, and effect of discriminating against the plaintiffs, the Court concludes that the Blacksmiths' seniority system also constitutes a violation of 42 U.S.C. § 1981. *Mescall v. Burrus,* 603 F.2d 1266 (7th Cir. 1979).

6. A union breaches its duty of fair representation only when its conduct towards a member or members is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). Based on the findings of fact set forth earlier in this opinion, the Court concludes as a

matter of law that the plaintiffs have failed to produce any evidence showing that the Machinists' bargaining unit has failed to properly and fairly represent its black members.

7. Having found a violation of Title VII with respect to the seniority system implemented by Ladish and the Blacksmiths, the Court concludes that all class members in this action should be granted an opportunity to transfer from their jobs within the jurisdiction of the Machinists to job vacancies within the jurisdiction of the Blacksmiths with full carryover seniority for all purposes. The Court has reviewed the terms of the consent decree previously entered between plaintiffs, Ladish, and four union defendants (not including the Blacksmiths). The Court determines that the seniority carryover relief established in the consent decree to which Ladish has already agreed would constitute reasonable and proper relief in this proceeding against the Blacksmiths. That is, those individuals who have indicated, pursuant to the consent decree, that they desire to transfer to jobs within the jurisdiction of the Blacksmiths shall be given an opportunity to do so as vacancies arise under the terms of the consent decree. This procedure will allow blacks to transfer from their present positions to jobs within the jurisdiction of the Blacksmiths with full carryover seniority to be exercised in th Blacksmiths' unit for all pertinent purposes and thereby obtain their "rightful place." *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States,* 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970); *United States v. N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973).

8. Plaintiffs are also entitled to monetary compensation for the loss they have suffered as a result of the dis-

crimination of the defendant Blacksmiths. Class members will be entitled to back pay with appropriate interest and to front pay to compensate them for any monetary loss sustained as a result of discrimination. *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). The back pay period will begin December 30, 1969, the appropriate limitation period in Wisconsin under § 1981.

Rule 53(b) of the Federal Rules of Civil Procedure permits reference to a special master in cases tried to the court of "matters of account and of difficult computation of damages." The determination of the amount owing to each class member from the Blacksmiths is an appropriate subjet for reference to a master. See *Hairston v. McLean Trucking Co.,* 520 F.2d 226, 233 (4th Cir. 1975). Accordingly, such a reference will be made following the disposition of any appeal which may be taken from the judgment entered today. If the judgment is affirmed and the reference to a master is made, the judgment will be amended following the conclusion of proceedings before the master to reflect the exact amount owing under this decision and order to each class member. A copy of the proposed order of reference to a master is attached as an appendix to this document.

9. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, declares that:

> "* * * In any action or proceeding to enforce a provision of sections 1981 * * *, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Although the Act on its face provides that the decision to award attorney's fees is a matter committed to the dis-

cretion of the Court, the Seventh Circuit has stated that "'a prevailing plaintiff should receive fees [under the Act] almost as a matter of course.'" *Bond v. Stanton,* 630 F.2d 1231, 1233 (7th Cir. 1980), quoting from *Davis v. Murphy,* 587 F.2d 362, 364 (7th Cir. 1978).

Plaintiffs need not prevail on every issue to be awarded attorney's fees under § 1988. As stated by the Seventh Circuit:

> "• • • Indeed, such a requirement would 'stifle the presentation of innovative causes of action and would force courts to rule on every issue in a case, even if its rulings would be redundant.' *Ohland v. City of Montpelier,* 467 F.Supp. 324, 349 (D.Vt. 1979). We note with approval the definition of prevailing party set forth by the First Circuit Court of Appeals in *Nadeau v. Helgemoe,* 581 F.2d 275, 278 (1st Cir 1978): 'plaintiffs may be considered "prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Busche v. Burkee,* — F.2d — (Nos. 80-1248 and 80-1345, slip op. at 19) (7th Cir., May 21, 1981).

Plaintiffs are prevailing parties for attorney's fees in this case with respect to the Blacksmiths. Plaintiffs are thus entitled to recover an amount of attorney's fees from the Blacksmiths based on work performed on the claims prepared and presented in which they were successful, *Busche v. Burkee,* supra, at 21; see also *Muscard v. Quinn,* 614 F.2d 577, 578-579 (7th Cir. 1980), as well as their costs.

The exact amount owing to the plaintiffs from the defendant Blacksmiths for attorney's fees, which are included in the judgment as an item of costs, will be de-

termined at the conclusion of the proceedings before the special master, and the judgment will be amended accordingly to reflect the dollar figure.

10. In contrast to standards governing the award of attorney's fees to prevailing plaintiffs, a successful Title VII defendant can only recover attorney's fees when the Court finds that plaintiffs' claim was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978). It is the Court's opinion that the plaintiffs' action is not so groundless as to justify a grant of attorney's fees to the Machinists or Die Sinkers. Indeed, the facts are that a number of defendants entered into a consent decree in this action which accorded to plaintiffs the very relief being sought here and that the plaintiffs prevailed against the Blacksmiths. Accordingly, neither the Machinists nor the Die Sinkers are entitled to recover an amount of attorney's fees against the plaintiffs. See generally *Nulf v. International Paper Co.,* — F.2d — (No 79-1008, 10th. Cir, Jan. 5, 1981).

IV. ORDER

IT IS THEREFORE ORDERED that judgment be entered consistent with the foregoing findings of fact and conclusions of law.

Dated at Milwaukee, Wisconsin, this 5 day of Aug., 1981.

UNITED STATES DISTRICT COURT

By: /s/ John W. Reynolds
John W. Reynolds
Chief Judge

FOOTNOTES

1. The record does not show that two of the named plaintiffs, Abraham Leflore and Fred J. Colin, ever filed EEOC charges. This fact was of no apparent matter to the defendants and is of no matter to the Court since each is a §1981 plaintiff and each would be a class member.

2. Absent Ladish as a party defendant to this action, the Court is well aware that in making its findings of fact, the Court may be required to find facts not admitted to by Ladish in the consent decree.

3. See footnote 2 and accompanying text.

4. The details and conclusions of the OFCC audit are discussed in the Court's findings of fact numbered 17 and 25.

5. No plaintiff testified regarding his effort to obtain a job under the jurisdiction of the Die Sinkers.

6. Bargaining unit seniority prevents empoyees from transferring to a job under the jurisdiction of another bargaining unit with full carryover seniority for all purposes. For example, as the Die Sinkers' seniority system operated and still operates, if a Machinist transferred to a job under the jurisdiction of the Die Sinkers, he would exercise departmental (date of entry into the Die Sinkers' bargaining unit) seniority for purposes of layoff, recall, and job bidding and plantwide (date of entry into Ladish workforce) seniority for purposes of fringe benefits.

7. For example, if a Machinist transferred from Machinist Department A ("A") into Machinist Department B("B"), then for one year after the date of his transfer into B he would not be able to exercise his bargaining unit seniority accrued in A for purposes of layoff, recall, and job bidding in B. After working for one year in B, he would recoup his bargaining unit seniority accrued in A, which recoupment

would be added to his bargaining unit seniority accrued in B for purposes of layoff, recall, and job bidding in B.

8. Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), provides in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *."

EXHIBIT A (PAGE 1)

LADISH CO. CUDAHY HOURLY EMPLOYEES HIRED
8/16/48-12/31/67: DISTRIBUTION BY INITIAL BARGAINING UNIT

YEAR	TOTAL PLACEMENTS	IAMAW	BLKS	IDSC	IBEW	IBFO	IFPTE	OPEIU	NON-AFFL.
8/16/48-12/31/48	89	41	41	1	-	-	-	-	6
1949	19	8	3	2	-	-	-	-	6
1950	226	128	62	7	-	-	-	-	29
1951	312	196	60	7	-	-	-	19	30
1952	86	57	15	-	1	-	-	8	5
1953	153	91	22	13	4	-	-	6	27
1954	72	44	2	6	2	-	-	1	17
1955	201	95	45	6	4	1	-	4	46
1956	266	162	12	16	6	-	-	12	58
1957	97	49	-	10	2	-	-	13	23
1958	24	2	-	15	-	-	-	-	7
1959	14	2	-	3	-	-	-	1	8
1960	48	16	-	1	-	-	13	1	17
1961	79	46	-	1	-	1	19	3	9
1962	48	19	-	-	2	-	4	5	18
1963	22	12	-	1	-	-	3	1	5
1964	33	13	7	-	-	-	7	6	-
1965	198	110	41	12	4	-	16	15	-
1966	255	107	57	10	4	-	38	39	-
1967	123	66	8	8	1	2	18	20	-
TOTAL	2,375	1,264	375	119	30	4	118	154	311

EXHIBIT A (PAGE 2)

LADISH CO. CUDAHY HOURLY EMPLOYEES HIRED
8/16/48-12/31/67: DISTRIBUTION BY INITIAL BARGAINING UNIT

YEAR	TOTAL PLACEMENTS	NON-AFFILIATED MET BLKS.	INCLUDES OPEIU IFFPTE	OPEIU SHOP	OPEIU OFC.	IAMAW INCLUDES IBFO	IAMAW INCLUDES IBEW
8/16/48-12/31/48	89	x	x	x	x	x	x
1949	19	x	x	x	x	x	x
1950	226	x		x	x	x	x
1951	312	x	x		x	x	x
1952	86	x	x		x	x	
1953	153	x	x		x	x	
1954	72	x	x		x	x	
1955	201	x	x		x		
1956	266	x	x		x		
1957	97	x	x		x		
1958	24	x	x		x		
1959	14	x	x		x		
1960	48	x			x		
1961	79	x			x		
1962	48	x			x		
1963	22	x			x		
1964	33						
1965	198						
1966	255						
1967	123						
TOTAL	2,375						

EXHIBIT B (PAGE 1)

LADISH CO. CUDAHY MINORITY HOURLY EMPLOYEES HIRED 8/16/48-12/31/67 DISTRIBUTION BY INITIAL BARGAINING UNIT

	IAMAW					BLKS.		IFPTE		IDSC
YEAR	BLACK	ORIENT.	AM.	IND.	SPAN.	AM.IND.	SPAN.	ORIENT.	SPAN.	SPAN.
1948	2	1			1	2	4			
1949				1						
1950	3			1	2	1	2			
1951	24				3		3			
1952	12				2		1			
1953	15						1			
1954					1					
1955	26				4	1	1			
1956	45	1			2					1
1957	7				4					
1958										
1959										
1960									1	
1961	2									
1962										
1963	1				1			1		
1964					1					
1965	19			2	3				1	
1966	20				5					
1967	14				7					
TOTAL	190	2		4	37	4	12	1	2	1

EXHIBIT B (PAGE 2)

LADISH CO. CUDAHY MINORITY HOURLY EMPLOYEES HIRED
8/16/48-12/31/67 DISTRIBUTION BY INITIAL BARGAINING UNIT

YEAR	OPEIU			NON-AFFL.		IBEW	IBFO
	ORIENT.	AM.IND.	SPAN.	AM.IND.	SPAN.		
1948							
1949							
1950					1		
1951							
1952							
1953							
1954							
1955				1	1		
1956							
1957							
1958							
1959							
1960							
1961							
1962							
1963					1		
1964							
1965							
1966		1	1				
1967	1	1					
TOTAL	1	2	1	1	3	0	0

APPENDIX H

(JUDGMENT)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM WATTLETON, et al.,

v. Plaintiffs,

THE LADISH COMPANY, et al.,

Defendants.

JUDGMENT

Civil Action

No. 75C746

JUDGMENT

In accordance with the findings of fact, conclusions of law, and order of the court entered today, the following constitutes the Court's judgment in this action. This judgment should be read in conjunction with the consent decree approved by the court in this action on February 13, 1981. This judgment encompasses matters left unresolved by the approval of the consent decree and is limited to the facilities of the defendant Ladish Company located in Cudahy, Wisconsin.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 1509 (hereinafter "Blacksmiths"), its officers, members, agents, employees, and those acting in concert with them or at their direction, are hereby enjoined from discriminating against plaintiffs and the class represented by plaintiffs wtih respect to membership in the Blacksmiths or with respect to transfer or entry into jobs under the jurisdiction of the Blacksmiths, and its officials, agents, and members are specifically directed to cooperate with the Ladish Company (hereinafter "Ladish") in effecting the transfers with full carryover seniority of plaintiffs and class members to jobs and departments under the jurisdiction of the Blacksmiths as more fully described herein.

2. This action is certified as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The class is defined as follows:

> All blacks hired by the Ladish Company prior to January 22, 1968, who (1) were hired by the Ladish

Company for jobs that were within the jurisdiction of the International Association of Machinists and Aerospace Workers, Local 1862, and (2) were employed by the Ladish Company as of December 30, 1969.

3. It is the Court's intention to allow transfers by class members to be made to jobs under the jurisdiction of the Blacksmiths under the same terms and procedures as set forth in paragraph IV of the consent decree. Accordingly, the Blacksmiths are directed to comply with paragraph IV of the consent decree approved by the Court on March 27, 1981, and to cooperate with the plaintiffs and Ladish in the implementation of the seniority relief provisions of the consent decree. In particular:

(a) It is the Court's understanding that Ladish, pursuant to the consent decree, has given each class member an opportunity to designate his current interest with respect to transfer into, inter alia, jobs under the jurisdiction of the Blacksmiths. Thus, Ladish has prepared, pursuant to paragraph IV(a) of the consent decree, a list of class members who now desire to transfer into jobs and departments under the jurisdiction of the Blacksmiths. As vacancies in entry level jobs occur in jobs under the jurisdiction of the Blacksmiths, which vacancies Ladish has determined to fill from outside the bargaining unit as set forth in paragraph IV(b) of the consent decree, qualified class members shall be allowed to transfer to the jobs and the departments they have requested in the order of their Ladish hire date seniority. Such transfers shall be in preference to all other transfer requests or to new hires.

(b) Upon transfer to a job or department under the jurisdiction of the Blacksmiths, class members will have ninety (90) days from the effective date of transfer in

which to transfer back to their former department with full accrued departmental seniority by filling out and signing a written retransfer request. Once a class member transfers back to his former department, he loses all transfer rights under this judgment. The International Association of Machinists and Aerospace Workers, District No. 10, Local #1862 ("Machinists") is directed to cooperate with Ladish to effect any retransfers as discussed above.

(c) Upon transfer to a job under the jurisdiction of the Blacksmiths pursuant to this judgment, the class members who are now members of a bargaining unit shall maintain bargaining unit, departmental, and/or classification seniority computed as of their most recent continuous date of hire with Ladish. Class members thus will be accorded full carryover seniority upon transfer to jobs under the jurisdiction of the Blacksmiths. Such seniority shall be thereafter utilized in the new department under the jurisdiction of the Blacksmiths according to the pertinent collective bargaining agreement.

(d) The red-circling provisions set forth in paragraph IV(e) of the consent decree will apply to transfers made to jobs under the jurisdiction of the Blacksmiths as set forth above.

4. The Blacksmiths are ordered to pay monetary compensation, consisting of back pay, appropriate interest, and front pay to all class members who hereafter demonstrate their entitlement to such compensation. All plaintiffs and class members who so desire will be given an opportunity to prove that they were interested in obtaining a job under the jurisdiction of the Blacksmiths. Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the Court will refer the issue of the individual

monetary entitlement of all plaintiffs and class members to a special master as provided in conclusion of law number 8 at pages 39-40 of the findings of fact, conclusions of law, and order issued today, following the disposition of any appeal taken from this judgment. Filed simultaneously with this judgment is the proposed "Order of Reference to a Master" detailing the steps to be taken and the legal principles to be utilized in back/front pay computations. Also set forth in the proposed "Order of Reference to a Master" is a discussion of the appropriate burdens of proof to be imposed by the special master.

5. The Machinists are directed to cooperate with Ladish as set forth in paragraph 3(b) above. All other claims made by the plaintiffs and the class members against the Machinists are hereby dismissed.

6. All claims made by plaintiffs and class members against International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 ("Die Sinkers") are hereby dismissed.

7. Plaintiffs and the class represented by plaintiffs shall recover their expenses and costs, including an amount for attorney's fees, from the Blacksmiths based on work performed on the claims prepared and presented on which they were successful. The amount of attorney's fees to be taxed as part of the costs of this action against the Blacksmiths shall be determined after the conclusion of the proceedings before the special master.

8. Neither the Machinists nor the Die Sinkers is entitled to recover an amount of attorney's fees against the plaintiffs and the class represented by the plaintiffs.

9. The Court will retain jurisdiction of this case to insure implementation of the seniority relief granted

above and with respect to those matters referred to the Master in the proposed "Order of Reference to a Master."

Dated at Milwaukee, Wisconsin, this 5 day of Aug., 1981.

APPROVED BY:

/s/ John W. Reynolds
John W. Reynolds, Chief Judge

SOFRON B. NEDILSKY, Clerk of Court

By: /s/ Stephen J. Nording
Deputy Clerk

APPENDIX I

(ORDER)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

September 2, 1982

Before

HON. WALTER J. CUMMINGS, Chief Judge

WILLIAM WATTLETON, et al.,

Plaintiffs-Appellees,

and

STEVE T. TILLMAN, et al.,

Plaintiffs-Intervenors-Appellees,

No. 81-2411 v.

THE INTERNATIONAL BROTHERHOOD OF BOILER MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509; THE INTERNATIONAL DIE SINKERS CONFERENCE AND MILWAUKEE DIE SINKERS, LODGE #140; and THE INTHERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL #1862,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 75 C 746
John W. Reynolds, Judge

On consideration of the "MOTION FOR EXTENSION OF TIME TO FILE DEFENDANT-APPELLANT'S SUGGESTION FOR THE APPROPRIATENESS OF A HEARING EN BANC" filed herein on August 30, 1982, by counsel for the defendant-appellant,

IT IS ORDERED that said motion is hereby GRANTED and the time for filing the defendant-appellant's petition for rehearing with suggestion for rehearing en banc is hereby extended to and including September 13, 1982.

APPENDIX J

(ORDER)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 27, 1982

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. GEORGE N. LEIGHTON, District Judge*

WILLIAM WATTLETON, et al.,

Plaintiffs-Appellees,

and

STEVE T. TILLMAN, et al.,

Plaintiff-Intervenors-Appellees,

No. 81-2411 vs.

THE INTERNATIONAL BROTHERHOOD OF BOILER MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.
No. 75 C 746
John W. Reynolds, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable George N. Leighton, District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX K

PETITIONERS' EXCERPTS FROM TRIAL COURT TRANSCRIPT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM WATTLETON, et al.,

v. Plaintiffs, Civil Action

THE LADISH COMPANY, et al., No. 75C746

Defendants.

Trial Court Transcript, Vol. VIII, pp. 1097-8, April 7, 1981:

THE COURT: ... And I want to say to the Blacksmiths' officials that are here this morning, both Mr. Seng and Mr. Jenks, how very impressed a favorably impressed with each of you and with the testimony and with your sincerity and with your objectivity and fairness. In practically all these civil rights cases, to a certain extent it's kind of like a generation on trial. I won't say all of them but at least many of them I

have been involved in, the current officials really weren't there making the decisions that this Court's decision is based upon. So really it isn't--you can say it's the generation on trial, but another way to look at it, it's probably an institution, and by historical acts, historical facts, the history of the institution, the present institution or the officials are held responsible for what their predecessors in office did.

NO. 82-1087

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

Petitioners,

v.

WILLIAM WATTLETON, et al.

and

STEVE T. TILLMAN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

STATEMENT

A. Prior Proceedings - This action was filed December 29, 1975 pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981 (and pursuant to other statutes not now pertinent). Respondents herein (hereafter "plaintiffs"), a group of blacks hired by Ladish Co. prior to 1968, sued Ladish and seven labor unions including petitioner herein (hereafter "Blacksmiths"). Plaintiffs alleged a class action and attacked, inter alia, the seniority systems maintained by the defendants in the pertinent collective bargaining agreements, contending the seniority systems intentionally perpetuated into the present past historical discriminatory hiring, assignment and transfer practices.

The District Court granted class certification (A. 14, 23).[1] Thereafter, after additional discovery and notice to the class, the District Court approved a Consent Decree settling plaintiffs' claims against Ladish and four of the union defendants (A. 25). The Consent Decree (A. 43)[2] provided, inter alia, for monetary payments to class members and allowed class members who so desired to transfer from jobs

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[1] The reference "A. ___" followed by the pertinent page(s) is to the Appendix filed by petitioner with its petition. While "Pet. ___" followed by the pertinent page(s) refers to the instant petition.

[2] The Consent Decree printed in the Appendix is not the decree entered by the Court. The decree printed in the Appendix states that the Machinists (see fn. 3 infra) joined in the decree; however, the Machinists were not a party to it.

within the jurisdiction of the union where they had initially been assigned [3/] to jobs within the jurisdiction of the other unions representing employees at Ladish with full carryover seniority for all purposes including competitive bidding.

Three of the union defendants, including the Blacksmiths, had the opportunity to join in the Consent Decree but did not. None of the non-settling defendants objected to entry of the Consent Decree. The Consent Decree specifically reserved to plaintiffs the right to proceed to trial

---

[3/] All plaintiffs and class members had initially been assigned to jobs within the jurisdiction of defendant International Association of Machinists and Aerospace Workers, Local No. 1862 (hereafter the "Machinists").

against the non-settling defendants (A. 44).

The failure of the non-settling defendants to agree to the Consent Decree effectively negated a portion of the seniority relief ordered in the Decree. Specifically, class members who desired to transfer with full carryover seniority into jobs within the jurisdiction of the non-settling union defendants, including the Blacksmiths, were prevented from doing so because those unions were not party to the Consent Decree.

In March 1981, plaintiffs proceeded to trial against the non-settling defendants, including the Blacksmiths. Thereafter, the District Court entered Findings of Fact and Conclusions of Law (A. 63) and a Judgment (A. 117) finding

that the Blacksmiths had taken actions intentionally designed to discriminate against blacks; that the seniority system negotiated by Ladish and the Blacksmiths had been negotiated and maintained with the intent and effect of discriminating against blacks; and that the Ladish-Blacksmiths' seniority system was not a bona fide one.

The Judgment, in pertinent part, imposed upon the Blacksmiths the seniority relief ordered in the Consent Decree (A. 119) and provided plaintiffs an opportunity to obtain additional monetary compensation in proceedings to be held before a special master (A. 120). The Judgment was stayed pending appeal. The Blacksmiths appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the lower

court (A. 1). The Circuit Court subsequently denied the Blacksmiths' petition for rehearing (A. 125).

B. Pertinent Facts - Plaintiffs are blacks who were hired by Ladish prior to January 22, 1968 directly into jobs within the jurisdiction of the Machinists. At all relevant times, plaintiffs have been unable to move from their Machinists unit jobs to jobs within the jurisdiction of other unions at Ladish, including the Blacksmiths, without forfeiting accrued seniority rights for competitive purposes such as layoff, recall and job bidding.

Ladish is a major employer in the Milwaukee area. The Blacksmiths, the second largest union at Ladish, represent approximately 1,000 of the 4,000 bargaining unit employees.

Between 1948 and 1968, Ladish hired 190 blacks who were still actively employed in 1974 when the Company analyzed its work force in response to an audit by the Office of Federal Contract Compliance. All of these blacks had been initially placed into jobs within the jurisdiction of the Machinists. During the years 1948 to 1968 (and only considering employees who were actively employed in 1974) Ladish had hired and placed 375 nonblack employees into jobs under the jurisdiction of the Blacksmiths as well as over 400 nonblack employees into jobs within the jurisdiction of the other unions at Ladish (A. 113-116). During this twenty year period no blacks were hired, assigned or transferred into Blacksmiths unit jobs (A. 71). Employees once assigned to a

job within the jurisdiction of one union at Ladish have, at all times material (with the single exception discussed below), faced the loss of competitive seniority if they transferred to a job within the jurisdiction of another union. An employee who would transfer from a job in the Machinists unit to a job within the jurisdiction of the Blacksmiths, for example, would exercise competitive seniority (layoff, recall and job bidding) within the Blacksmiths unit as of the date of transfer only (A. 82). The seniority system thus discouraged transfer of any employee who had been with the Company for a significant period of time because the resultant seniority loss would subject a transferring employee to possible layoff or force him to accept the least desir-

able jobs in his new unit. While Ladish maintained a stated policy of allowing inter-bargaining unit transfers the District Court found that several plaintiffs had been met with discouragement and outright harassment when they attempted to transfer to jobs within the Blacksmiths unit (A. 87).

Ladish and the Blacksmiths entered into their first collective bargaining agreement in 1945. Employees in 1945 who transferred from a job within the jurisdiction of another bargaining unit to a job within the jurisdiction of the Blacksmiths unit forfeited their competitive seniority for purposes of layoff, recall and job bidding. The original contract contained a nondiscrimination clause (Article I, ¶4) which read as follows:

> Neither the Company nor the Union shall discriminate against any employee because of his membership or non-membership in the union, or his race, color, creed, or national origin (A. 94).

However, beginning with the Ladish-Blacksmiths agreement effective August 22, 1949 to September 30, 1951 which was negotiated after the first blacks were hired at Ladish (in 1948), the Blacksmiths negotiated several contract changes which adversely affected black employees. First, the nondiscrimination clause which had been included in the original Ladish-Blacksmiths agreement and maintained in two subsequent agreements was eliminated. Second, the competitive seniority rights of employees transferring into the Blacksmiths bargaining unit from other units were changed so that if an employee transferred from a job within the jurisdic-

tion of another bargaining unit to a job within the jurisdiction of the Blacksmiths, he was allowed to carry with him his accrued plantwide seniority for purposes of layoff and recall (A. 96). Finally, the 1949-1951 agreement contained a new provision (Article IV, Transfers and Layoffs, ¶8) regarding inter-bargaining unit transfers (A. 95) which read as follows:

> Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred.

At various times from August 1949 to January 27, 1955, a number of nonblack employees transferred from jobs within the jurisdiction of other bargaining units to jobs within the jurisdiction of the Blacksmiths

(A. 96). All of the transferring employees were able to utilize their carryover seniority for layoff and recall purposes in the Blacksmiths unit. During this same 1949-1955 period, no blacks were allowed to transfer.

In the Ladish-Blacksmiths collective bargaining agreement effective September 20, 1954 to September 24, 1956, the provision allowing carryover plantwide seniority for the purpose of layoff and recall for those transferring into the Blacksmiths unit was deleted; however, the Company and the Blacksmiths have continued to the present to allow the nonblack employees who transferred into jobs within the Blacksmiths jurisdiction between 1949 and 1955 to retain and utilize their carryover seniority for layoff and recall purposes.

The nondiscrimination clause which had been contained in original Ladish-Blacksmith contract and which was deleted in 1949 was not returned to the pertinent collective bargaining agreement until after the passage of Title VII in 1964. The provision concerning inter-bargaining unit transfers into Blacksmiths unit jobs which required agreement with respect to such transfers by both management and the bargaining committee of the Blacksmiths was retained in the Ladish-Blacksmiths collective bargaining agreement at least until 1966.

Two witnesses with expertise concerning the history of seniority systems in the Milwaukee area and throughout the United States testified that they were unaware of any collective bargaining

agreements where a multi-unit seniority system had, at one time, allowed carryover of full plantwide seniority for employees transferring from one unit to another for purposes of layoff and recall and then been changed to prohibit the carryover of such seniority for said purposes (A. 97). The Court below found (A. 98):

> 74. These changes in the Ladish-Blacksmiths' collective bargaining agreement, when considered in light of the evidence heard by the Court relating to individual blacksmith's feelings toward transfer of the plaintiffs into jobs under the jurisdiction of the Blacksmiths and the evidence showing that nonblacks were allowed to transfer with full carryover seniority to jobs under the jurisdiction of the Blacksmiths while during the same time period blacks were discouraged from doing so, are persuasive evidence that the Blacksmiths' seniority system has not been negotiated and main-

> tained free from any illegal purpose. The Court specifically finds that the plaintiffs have come forward with sufficient credible evidence to support their claim that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths.

REASONS TO DENY THE WRIT

The decision below is correct and is consistent with the rulings of this Court. Petitioner does not attack any specific findings of fact, and the findings, including those of intentional discrimination, are not clearly erroneous. Petitioner did not request contribution or idemnification in its responsive pleadings nor was the issue raised in the district or circuit courts. Contribution is neither proper

under the facts of this case nor required by previous decisions of this Court. Further review of this case is thus unwarranted.

I. The Pertinent Seniority System was Properly Found to have Violated Title VII. The Blacksmiths contend that the District Court, as affirmed by the Court of Appeals, was in error in concluding that the Blacksmiths-Ladish seniority system was negotiated and maintained with the intent to discriminate against blacks. In the Petition, however, the Blacksmiths do not identify any specific facts found by the District Court or inferences drawn therefrom which the Blacksmiths contend are incorrect. Petitioner even admits that the pertinent changes in the collective bargaining agreements "supported

the court's inference that the Blacksmiths were attempting to keep blacks out of their bargaining unit" (Pet. 28). Petitioner further admits that it is the role of the District Court to make findings on the issue of intent using all the evidence and reasonable inferences drawn therefrom (Pet. 28). See, Pullman-Standard v. Swint, ____U.S.____ (1982); Village of Arlington Heights v. Metro. Housing Div., 429 U.S. 252, 266 (1977).

The writ should not be granted because the relevant facts are unique to this case and because the pertinent findings and legal conclusions are correct. The existence of historical discrimination in hiring, transfer and assignment is conceded. The fact that the pertinent seniority system "locked in" the effects of this historical

discrimination by requiring plaintiffs to forfeit competitive seniority if they transferred to the previously all-white jobs is also admitted. Prior to this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), no further proof would be required for plaintiffs to prevail.

After Teamsters, however, the District Court was required to scrutinize the history of the pertinent seniority system to determine if the system was bona fide and thus protected by Section 703(h) of Title VII. The trial court was faithful to Teamsters and its lower court progeny. It analyzed the "totality of the circumstances" and found purposeful discrimination by the Blacksmiths in the maintenance and negotiation of the

pertinent system. See, Teamsters, supra at 352-356; James v. Stockham Valves & Fittings Co. 559 F.2d 310, 352 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978). The Seventh Circuit, faithful to Swint (A. 9-12), affirmed the District Court's findings and legal analysis.

The trial court, realizing that a finding of intentional racial discrimination required a "sensitive inquiry" (A. 87), weighed the evidence discussed above and other relevant evidence and concluded the seniority system was infected with discrimination and thus was not bona fide. In performing its duty, the District Court, contrary to petitioner's assertion, acted in complete accord with this Court's decision in Teamsters. The Teamsters inquiry was carefully conducted and as Swint makes

clear, the findings, including those of intent, can only be reversed if clearly erroneous, a standard which petitioner has neither alleged nor met.

II. The Blacksmiths are not Entitled to Contribution or Indemnification. Plaintiffs settled their claims against defendant Ladish and several of the union defendants in a Consent Decree. The Blacksmiths, who refused to join the decree and thereby delayed the opportunity for plaintiffs to obtain substantial seniority relief, now seek, in the face of authority they admit is "consistent(ly)" against them (Pet. 33), protection from the consequences of their tactical decision.

Plaintiffs contend that the Blacksmiths are precluded from raising the contribution issue in this Court because

it has never before been raised in this litigation. The Blacksmiths, in their responsive pleadings, neither sought contribution or indemnification from any of the other defendants nor filed any crossclaims against Ladish. Petitioner did not object to the Consent Decree in anyway, and the contribution issue was not raised in any form at trial or on appeal until the instant petition was filed.

The Blacksmiths have not provided any reason why this Court should deviate from the normal rule that it will not consider issues neither raised before or considered by the Court of Appeals. Addickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970) and cases cited therein. Indeed, to allow the issue to be considered for the first time in this Court would upset the expectations of those

parties who agreed to the Consent Decree.

Nevertheless, even assuming that this issue is properly before this Court, the issue was settled in Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981). The Northwest Airlines case held that Title VII specifically did not allow for contribution in a case brought by an employer against a union seeking contribution under a joint collective bargaining agreement. The Blacksmiths now attempt to distinguish Northwest Airlines and contend unions should be entitled to contribution because Title VII "was expressly directed against employers" (Pet. 42-43). The Blacksmiths are simply wrong in their assertion that Title VII was not designed to prevent discrimination caused by labor unions.

The statute specifically prohibits unions, as well as employers, from engaging in intentional discrimination. There is nothing in the Northwest Airlines decision or the petition which provides a rationale for allowing unions contribution denied to employers. Contrary to the Blacksmiths' assertions, this case is unlike duty of fair representation cases. In those cases, two distinct elements, an employers' wrongful conduct and a union's failure to represent its member, are typically involved. Here, the Ladish-Blacksmiths collective bargaining agreements are the products of the joint efforts of both the employer and union and each party is responsible for its intentional acts of discrimination.

Petitioner's assertion that Ladish has a right to contribution (Pet. 46) is

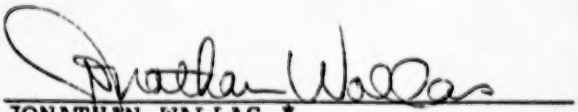
wrong. Ladish's payments under the Consent Decree will not be reduced if additional payments are received by the Blacksmiths.

Finally, the Blacksmiths' contention that they were denied a fair trial because Ladish settled with the plaintiffs is frivolous. Petitioner has never raised this claim in any court prior to this one, and Ladish officials were deposed, testified at trial and were examined by the Blacksmiths.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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January 1983